71-1672

Supreme Court, U. S.
FILED
JUN 23 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. ....

T. W. GUTHRIE, ET AL,

Petitioners.

versus

ALABAMA BY-PRODUCTS COMPANY, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District for the Northern District of Alabama.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Guthrie v. Alabama By-Products Company* (U.S.C.A., 5th, #71,2498, March 28, 1972) is not yet reported, but is included in the appendix hereto at pages A-5 to A-6. The opinion of the District Court in the case is reported at 328 F. Supp. 1140 and is included

in the appendix hereto at Pages A-7 to A-21. The judgment therein is appended at page A-22.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2101 (c) to review the judgment of the Court below entered on March 28, 1972 in this private civil action. No order respecting rehearing below or an extension of time here has been entered.

QUESTIONS PRESENTED FOR REVIEW

This is a multi-Plaintiff, multi-Defendant private civil action for damages and injunctive relief brought under Section 13 of the *Rivers and Harbors Appropriations Act of 1899*, 30 Stat. 1152, as amended, 33 U.S.C. § 407, (hereinafter termed Refuse Act.) The Defendants are each manufacturing establishments discharging refuse into navigable waters or tributaries thereof in Birmingham or Jefferson County, Alabama without the permit required by the Refuse Act. The Plaintiffs are each lower riparian land holders who aver special damage to their property rights. Jurisdiction below was based on federal question jurisdiction, 28 U.S.C. § 1331, as an action arising under Section 13 of the Refuse Act.

There are three (3) primary questions presented for review:

1. Is the direct discharge into navigable waters of manufacturing refuse without the permit required by Section 13 of the Refuse Act lawful if it does not impede or obstruct navigation?

2. If the discharge of refuse is not lawful, can private parties maintain an action to redress injury systained by them as a consequence of violations of the Refuse Act?

3. *If the discharge of refuse is not lawful, is an action brought by private parties to redress injury for the unlawful conduct an action arising under the laws of the United States?*

PERTINENT STATUTE

Rivers and Harbors Act of 1899 (Refuse Act) 33 U.S.C. § 407:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any

material above mentioned in navigable waters within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful." 30 Stat. 1152.

STATEMENT OF THE CASE

A Writ of Certiorari is sought to review the Fifth Circuit's affirmance of the District Court's dismissal of the complaint in this case for lack of federal jurisdiction.

The eighty-four (84) petitioners are each citizens of the State of Alabama who are lower riparian land holders whose property is located on the banks of one or more of three separate streams flowing through the Birmingham area of Jefferson County, Alabama and into the Black Warrior River which is a navigable waterway in the State of Alabama. The complaint charges that each of the Plaintiffs has suffered special damage from the conduct of each of the Defendants who each operate manufacturing establishments that, without first obtaining the required permit, deposit industrial refuse into one or more of the streams that are tributaries of the Black Warrior River from whence the refuse floats into the navigable water. The complaint alleges that the deposit of refuse by each of the Defendants polluted the streams or rivers on which the Plaintiffs' property is located to the damage of each of the Plaintiffs who each seek compensatory and punitive damages in excess of the federal jurisdictional amount together with injunctive relief.

Each of the Defendants is an industrial or manufacturing establishment and each Defendant discharges refuse without first obtaining the required discharge permit. Each of the Defendants, except those with multiple site operations, operates its polluting establishment independently of

the other polluting operations. All of the Defendants are charged with separate or several liability to each of the Plaintiffs.

The essence of the case is: The Defendants directly discharged refuse from their plants into streams flowing into navigable waters. They did this without applying for, or obtaining, any permit from the United States for this discharge. This discharge polluted the streams and waters and rendered them toxic. The discharge did not result in a direct impediment or obstruction to navigation, but it did result in damage to the lower riparian land holders in a variety of ways.

The Plaintiffs brought this action for the damages resulting to them from the Defendant's breach of the Refuse Act as an action arising under the laws of the United States in the nature of an action for "statutory wrong" or negligence per se.

The District Court dismissed the complaint before trial for lack of federal question jurisdiction under the theory that the Plaintiffs could not maintain the action unless the discharge of refuse impeded or obstructed navigation. The Fifth Circuit affirmed, apparently holding that the Complaint not only failed to invoke federal question jurisdiction, but also failed to present a claim for relief for a violation of the act unless the Defendant's conduct constituted an interference with navigation by which the Plaintiffs were injured.

Both lower Courts thus have held that Section 13 of the Refuse Act applies only to discharge of refuse that interferes with navigation and not to discharge that merely pollutes. We believe this to be erroneous.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. *Important Question Of Federal Law*

The decision of the Courts below clearly interpose a requirement into Section 13 of the Refuse Act that the

direct discharge of manufacturing refuse must impede or obstruct navigation. The addition of this requirement to the section affects not only the private interests of injured riparian land holders, but also the public at large and the policy of the United States.

The environmental concern of the public and its government over polluted waters need not be called to the attention of this Court.

The Refuse Act, and particularly Section 13 thereof, has recently been resurrected from the obscurity with which it resided in the statute books and now occupies a principal place in the drive to clean up our national waters. The Justice Department has instituted criminal and civil prosecutions for its violation; the Corps of Engineers has promulgated regulations for the discharge of refuse. The interference with navigation test adopted by the Fifth Circuit eviscerates the Refuse Act as a tool in this drive for "living" water. This case presents to the Court the opportunity to squarely hold that Section 13 prohibits pollution irrespective of interference with navigation and put to rest the doubts that the Fifth Circuit has created in this area of vital national importance.

2. *Conflict With Applicable Decisions Of This Court*

The decision of the Fifth Circuit with respect to interpolation of the "impediment to navigation" test into the direct discharge provision of Section 13 of the Refuse Act conflicts with the decision of this Court in *U.S. v. Standard Oil Co.* 384 U.S. 224.

The decision of the Fifth Circuit with respect to federal question jurisdiction in this private civil action conflicts with the decisions of this Court in *Gully v. 1st National Bank* 299 U.S. 109; *Tunstall v. Brotherhood of Locomotive Firemen and Engineers* 323 U.S. 210; *Steele v. L.&N. Railroad Company* 323 U.S. 192; *Texas & Pacific Ry Co. v. Rigsby* 241 U.S. 33; and *Bell v. Hood* 327 U.S. 678.

The decision of the Fifth Circuit with respect to the right of the specially damaged parties to maintain an action for statutory wrong conflicts with the decisions of this Court in *Sierra Club v. Morton* 31 L.ed 2d 636; *Wyandotte Trans. Co. v. U.S.* 389 U.S. 191; *Texas & Pacific Ry. Co. v. Rigsby* 241 U.S. 33; *J. I. Case Co. v. Borak* 377 U.S. 426.

3. Conflict With Decisions Of Other Courts Of Appeal

The decision of the Fifth Circuit with respect to the requirement of an impediment to navigation conflicts with the decisions of the 2nd Circuit in *United States v. Ballard Oil Co.* 195 F.2d 369; the 3rd Circuit in *U. S. v. Esso Standard Oil* 375 F. 261; and the 9th Circuit in *La Merced* 84 F.2d 444.

ARGUMENT

I. THE DIRECT DISCHARGE OF REFUSE (OTHER THAN "SEWAGE") INTO NAVIGABLE WATERS IS UNLAWFUL UNLESS A PERMIT IS FIRST OBTAINED FROM THE CORPS OF ENGINEERS AND THE DISCHARGE NEED NOT OBSTRUCT OR IMPEDE NAVIGATION.

A. THE PLAIN LANGUAGE OF THE ACT IMPOSES NO CONDITION THAT THE DISCHARGE IMPEDE OR OBSTRUCT NAVIGATION.

The plain language of § 13 of the Refuse Act clearly does not interpolate a requirement of any impediment or obstruction to navigation into the prohibition of direct discharge of refuse matter into navigable waters, or their tributaries. This may be easily seen if the prohibition against direct discharge, which is separated from the prohibition of deposits on banks of navigable waters by a semi-colon, is considered by itself. The statute thus reads:

> "It shall not be lawful to . . . discharge . . . from the . . . manufacturing establishment . . . any refuse matter . . . [other than sewage] into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; . . . And provided further, that the Secretary of the Army, whenever in the judgment of the Chief of Engineers, anchorage and navigation will not be injured thereby may permit the deposit of any material above mentioned in navigable waters, . . . provided application is made to him prior to depositing such material; . . ." 30 Stat. 1152

There is no language in the portion of Section 13 prohibiting discharge of refuse directly into navigable waters or their tributaries that requires any impediment to or obstruction of navigation as a condition precedent to the prohibition.

In that partion of Section 13 commencing after the semi-colon a different activity is prohibited:

> ". . . 'and it shall not be lawful to deposit . . . . material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall be impeded or obstructed: . . ."

It is immediately apparent that the act imposes different tests depending on whether the *refuse* is deposited directly into the navigable water (or tributary) or whether the *material* is placed on a bank. The former conduct is illegal irrespective of any impediment or obstruction to navigation; the latter conduct is illegal only if navigation shall be impeded or obstructed.

B. JUDICIAL CONSTRUCTION OF THIS STATUTE HAS, UNTIL THIS CASE, UNANIMOUSLY SUPPORTED THE PETITIONERS' INTERPRETATION OF THE REFUSE ACT.

In *La Merced* (U.S.C.A. 9th 1936) 84 F.2d 444 Section 13 of the Refuse Act was construed:

> "We see no ambiguity in the statute which prohibits the deposit of 'any refuse matter of any kind or description whatever . . . into any navigable water of the United States'. It is difficult to see how the statute could be plainer, for the meaning is clear under a literal reading of the statute . . ."
>
> "Under such literal construction we see no reason for limiting 'refuse matter of any kind or description whatever' to such refuse matter only as would impede or obstruct navigation . . ." 84 F.2d 444, 446

A most distinguished panel of the Second Circuit interpreted § 13 of the Refuse Act as creating two separate offenses in *U.S. v. Ballard Oil Co. of Hartford* (U.S.C.A. 2d 1952) 195 F.2d 369, 370, in which it was said:

> "The section creates two separate, though kindred, offences; (1) to 'suffer' 'refuse matter' to be 'discharged, or deposited . . . . into any navigable water'; (2) to 'suffer . . . . to be deposited material of any kind in any place on the bank of any navigable water, . . . where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise'. Textually, the second clause is limited by the concluding phrase 'whereby navigation shall or may be impeded or obstructed'; and that interpretation fits well into its purpose, provided one reads it as covering only 'material' which gravity alone will not carry into a stream. Considering the probability that the two sentences were not meant to overlap, it is more reasonable to read the second sentence in this way; . . . ."

This Court has held that § 13 of the Refuse Act intended to correct "serious injury . . . caused in part by obstacles that impeded navigation and in part by pollution . . ." *U.S. v. Standard Oil Co.* 384 U.S. 224, 228-229. Notwithstanding the clear language of Justice Douglas in the *Standard Oil* case differentiating between injuries from obstacles to navigation and from pollutants it has been argued that *Standard Oil* should be distinguished from the present case because floating oil, if afire or in vast quantities, impedes navigation. It is as arguable that any pollution obstructs or impedes navigation. "Navigation" is not only the traffic of freighters, barges and tankers; it is the traffic of sail boats, fishing boats and canoes. Toxic, noxious, polluted water impedes the use and enjoyment of the rivers and streams as much as the threat of fire from an oil spill.

After this Court's decision in *Standard Oil*, the Third Circuit in *U.S. v. Esso Standard Oil Co. of Puerto Rico* (U.S.C.A. 3rd) 375 F.2d 621 (1967) followed the Second, Ninth and Supreme Court decisions in a criminal prosecution brought under the direct discharge provision

of § 13 and imposed liability for the discharge of oil into navigable waters in a case wherein it was agreed that the discharge did not impede or obstruct navigation.

The "impediment to navigation test" adopted by the Fifth Circuit is not merely a "narrow, cramped reading" of § 13 of the Refuse Act; it is an absolute misreading.

C. THE LEGISLATIVE HISTORY OF THE REFUSE ACT DOES NOT SUPPORT THE CONSTRUCTION PLACED ON IT BY THE COURTS BELOW.

The District Court relied on its interpretation of the admittedly sparse legislative history of the Refuse Act to support its conclusion that the direct discharge provision of § 13 required an impediment to navigation. Apart from the Courts disregard of the plain language rule of statutory construction, a much more substantive error was committed by it in also disregarding this Court's construction of that same legislative history as set forth by the Court in *Standard Oil*, supra:

> "It is plain from its legislative history that the 'serious injury' to our water courses sought to be remedied was caused in part by obstacles that impeded navigation and in part by polution . . ." 384 U.S. 224, 228-229.

It would seem that little beyond what this Court has already said, need be said here. However, we have appended for the Court's convenience that portion of an article on *The Refuse Act of 1899* appearing in the *Environment Reporter* on January 28, 1972 related to the legislative history of the Refuse Act. The article contains, in addition to the matter discussed by this Court in *Standard Oil*, comments made in 1926 by Judge G. W. Koonce, an employee of the Corps of Engineers, who assisted in the drafting of the act, that:

> "Under . . . § 13, relating to the discharge of [sic] deposit of refuse matter in navigable water the com-

> mission of any of the acts forbidden, not their results, constitute the offense, and the commission subjects the offending party to the prescribed penalty, *regardless of whether or not there is any actual injury to navigation." (Emp. added)* Environment Reporter, Monograph No. 11, p. 4. Appendix A.

To this we add that the understanding of the Refuse Act by one of its drafters is entirely consistent with its legislative history and this Court's construction of that history.

Section 6 of the Appropriation Act of 1890, made it unlawful to cast, throw, empty or unload certain specified items, all of which might be classed as waste materials, into navigable rivers which should tend to impede or obstruct navigation or to place waste in any place on a bank of a navigable water where it might be washed into a navigable water whereby navigation should be impeded or obstructed. 26 Stat. 453.

Thereafter, the Act of 1894 *added,* without repealing the 1890 Act, the language in Section 6 that made the discharge of matter of any kind other than "sewage" illegal without any reference or requirement whatever of an impediment or obstruction to navigation. 28 Stat. 363.

The Act of 1899 was not, however, a mere codification of the 1890 and 1894 Acts inasmuch as Section 21 expressly repealed any acts in conflict with Sections 10 to 20, which said sections include the pertinent provisions of the Refuse Act. 30 Stat. 1152, 1155. The omission of any requirement of obstruction or impediment to navigation in the 1899 Act is consistent with the added restrictions of the 1894 Act and is, in fact, merely a broader prohibition than that contained in the 1890 Act. In other words, *the extent of the conduct prohibited was extended by the 1894 Act through the deletion of the requirement of an impediment to navigation and Congress approved this extension in 1899.*

The Congressional Record cited by the trial court, so far as is known by Counsel for Plaintiffs, is not inconsistent with the expanded prohibitions of the 1894 and 1899 Acts in that the suggestion that the 1899 Act revised and made clear the existing laws applies with equal force to the prohibition against depositing refuse irrespective of an impediment to navigation contained only in the 1894 Act, as well as that other prohibition requiring an impediment to navigation contained in the 1890 Act. 26 Cong. Record 4376 (House, May 3, 1894); 32 Cong. Record 2297, 2923 (Senate; House).

The Attorney General's Opinion of 1896 relied on by the trial court was not only issued prior to the passage of the 1899 act but may be regarded as consistent with subsequent construction of the Act. In part, the Secretary of War had posed the question:

> ". . . is it the duty of the Secretary of War to act on every petition presented under the circumstances involved in this case, or is it only his duty to act in cases in which the interests of navigation will be affected?"

The answer was:

> "I am of the opinion that it is your duty to act upon the application. If you should decline to act in this and similar cases *the above section would operate as an absolute prohibition*. . . . This was not the intention of Congress [in conferring discretion on the Secretary of War to remove the prohibition to effect the purposes contemplated by Congress]." (Emphasis supplied) 21 Op. Atty. Gen. 305, 306.

D. THE CONSTRUCTION OF THE REFUSE ACT BY THE FIFTH CIRCUIT CONFLICTS WITH THE ENFORCEMENT PROCEDURES OF THE UNITED STATES.

Governmental agencies enforcing the Act do not consider an impediment to navigation to be a condition prece-

dent to compliance with the anti-discharge provisions of the Act.

Regulations of the Refuse Act permit program issued by the Corps of Engineers on April 7, 1971 provide in part:

> "The Refuse Act is considered to apply to all direct and indirect discharges or deposits (except those flowing from streets and sewers and passing therefrom in a liquid state) by any person, firm or other entity, including discharges or deposits from municipal, state or federal facilities or installation, into a navigable waterway or tributary." 33 *C.F.R.* §209.131 (d) (i); 36 Fed. Reg. 6564 (1971)

In several cases the Justice Department has prosecuted violators of the Refuse Act where there has been no impediment to navigation. *U.S. v. Interlake Steel Corp.* (U.S. D.C. N.D. Ill. 1969) 297 F. Supp. 912; *U.S. vs. U.S. Steel Corp.* (U.S. D.C. Ind. 1970) 328 F. Supp. 354; *U.S. v. U.S. Steel Corp.* (U.S.D.C., N.D. Ill. 1971) F. Supp. In fact, in *U.S. v. Pennsylvania Industrial Chemical Corp.* (U.S.D.C., W.D. Pa. 1971) 329 F. Supp. 118, the Court, after noting the uniqueness of the holding in this case, agreed with the prosecution that all industrial discharges are prohibited irrespective of not only an impediment to navigation but even of an effect upon the water.

The failure to reverse the decision in this case will not only materially impede the enforcement of the statute by the United States but may leave the States in the Fifth Circuit to march alone to a different tune.

II. THE UNLAWFUL DISCHARGE OF REFUSE INTO NAVIGABLE WATERS IS ACTIONABLE BY SPECIALLY DAMAGED PRIVATE PARTIES AND IS AN ACTION ARISING UNDER THE LAWS OF THE UNITED STATES

The decisions of the lower courts in dismissing for want of federal jurisdiction because the Plaintiffs were not in-

jured by an obstruction to navigation left unresolved two questions submitted by petitioners to this Court for review in the hope, if this Court should reverse the lower courts in their limited decisions with respect to the requirement of an impediment to navigation, that the Court will also hold that the action brought by Plaintiffs arises under federal law and that the statute creates a private civil action implied at law for injury resulting from the Defendants' breach.

The petitioners' action does not involve "standing" in the sense of this Court's recent decision in *Sierra Club v. Morton* or *Alameda Conservation v. California* (U.S.C.A., 9th 1971) 437 F. 2d 1087 although both decisions support the petitioners' right to maintain an action for their special injury. Rather, the petitioners' action is a classic action for statutory wrong.

A. THE RIVERS AND HARBORS ACT OF 1899 CREATES A PRIVATE CIVIL ACTION IMPLIED AT LAW FOR ITS BREACH

The principle that a civil remedy is implied at law in favor of those for whose benefit a criminal statute was enacted is widely accepted. Indeed, this rule has recently been implicitly recognized by the Fifth Circuit in *U.S. v. Cargill, Inc.* (U.S.C.A., 5th, 1966) 367 F. 2d 971 and affirmed in *Wyandotte Trans. Co. v. United States,* 389 U.S. 191, 202, (1967) in which a civil action implied in favor of the government under the Rivers and Harbors Act was held to lie. This Court held:

> ". . . Our decisions in cases involving a civil actions of private parties based on the violation of a penal statute [indicate that the general rule may be invoked in favor of the government]. *Texas & Pacific R. Co. v. Rigsby* 241 U.S. 33 (1916); *J. I. Case Co. v. Borak* 377 U.S. 426 (1964). In those cases we concluded that criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had

> intended. Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm was of the type that the statute was intended to forestall, we held that civil actions were proper. That conclusion was in accordance with a general rule of the law of torts. See Restatement (Second) of Torts Section 286 . . . ."

To the same effect are: *United States v. Republic Steel* 362 U.S. 482 (1960); *Hooper v. Mountain State Securities* (U.S.C.A., 5th, 1960) 282 F. 2d 195; *Fitzgerald v. Pan American World Airways* (U.S.C.A., 2nd, 1956) 229 F. 2d 499.

The plaintiffs contend that, where a statute establishes a standard of conduct, a person injured by the breach of that standard of conduct is within the class for whom protection is afforded and may recover in damages for its breach even though the statute fails to expressly provide for a private right of action. The right of recovery is implied from the breach of duty. See: *Texas & Pacific v. Rigsby* 241 U.S. 33 (1915) in which as to this point the Court says in construing the Safety Appliance Act:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employer's Liability Act, has never been doubted. (citations omitted) A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied according to a doctrine of the common law. . . ."

And see: *Tunstall v. Brotherhood of Locomotive Fireman and Enginemen*, 323 U.S. 210 (1944); *Steele v. L & N*, 323 U.S. 192 (1944):

> "We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway

> Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted.
>
> It is the federal statute which condemns as unlawful the Brotherhood's conduct. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted (cites omitted) The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction. . . ."

The Second Circuit addressed itself squarely to both the implied cause of action and federal question jurisdiction questions in *Fitzgerald v. Pan American World Airways*, 229 F. 2d 499 (2nd, 1956). In that case, Ella Fitzgerald was refused passage in Hawaii. The action was brought under federal question jurisdiction in New York for the violation of non-discrimination provisions of the Civil Aeronautics Acts. A violation of the section was made a crime under separate sections of the Act. The District Court dismissed holding that there was no express civil liability under the Act, that the claim was cognizable in state law and that there was no federal jurisdiction. The Second Circuit reversed saying:

> "Consequently, by implication, its violation creates an actionable civil right for the vindiction of which a civil action may be maintained by any such person who has been harmed by the violation (cites omitted). Although no express civil liability is provided a criminal statute creates a civil right in the protected class although the only express sanctions are criminal."

The clear and consistently applied construction of the Rivers and Harbors Act of 1899 from the earliest case to the latest — and including two prior decisions of the Fifth Circuit — hold that a private civil action may be maintained as an original action for damages or other relief from violation of the Act.

We have previously demonstrated that the lower courts erred in holding that an impediment to navigation is required under §13 of the Refuse Act. To the extent that the Fifth Circuit may have held that a federal cause of action does not exist in favor of the plaintiffs even if there were an impediment to navigation, we are compelled to discuss some of the numerous decisions under the Rivers and Harbors Act of 1899 holding that a federal action does lie. We note here, in passing, that we have previously pointed out that the 1899 Act was one act replacing both the 1890 and 1894 Acts. As such, decisions under other sections of the Act are relevant to a decision under §13.

The Fifth Circuit first held that there was a private federal cause of action for violation of the Act in *Neches Canal Co. v. Miller & Vider Lumber Co.* (U.S.C.A. 5th 1928) 24 F. 2d 763. In that case a lumber company brought an original action in the District Court seeking injunctive relief and damages from the defendants who constructed a dam, in violation of §401 of the statute, that prevented the movement of logs and resulted in the loss of some logs. The Court held:

> "The Lumber Company, being the user of the navigable stream which was obstructed in violation of the statute, was a beneficiary of the statute forbidding its obstruction, and the remedy given by the statute was available in behalf of the Lumber Company. The suit was maintainable in the court below as one arising under the laws of the United States, as a right asserted and a remedy sought by the amended bill was based on acts of Congress."

In what the Fifth Circuit characterized as a "maritime" case an original action in the District Court seeking damages for loss of a vessel sunk by timbers afloat in a navigable water was held to state a claim under §13 of the Refuse Act. *Acme Boat Rentals v. J. Ray McDermott & Company* (U.S.C.A. 5th 1970) 424 F. 2d 393. So also, a private cause

of action brought for failure to comply with marking regulations under the Act that caused damage to the plaintiff's vessel was held to create an implied cause of action. *American Zinc Co. v. Foster* (U.S.D.C., Miss., 1970) 313 F. Supp. 671.

In *Lauritzen v. Ches. Bay Bridge & Tunnel Dist.* 259 F. Supp. 633 (D.C. Va. 1966); *aff'd in part,* (U.S.C.A. 4th 1968) 404 F. 2d 1001 an action was brought for damages sustained by a vessel that struck an underwater obstruction left in the river in violation of the regulations issued in connection with the construction of a bridge. The District Court said:

> "It is true that the federal navigation regulations do not expressly provide a cause of action for injured third parties. . . .but such liability is clearly implied. Even though it be conceded that the statutes pertaining to the protection of navigable waters (cites omitted) are penal in nature, it is clear that civil liability may be derived therefrom both in favor of the United States (cited omitted) and private parties. *Morania Barge #140 Inc. vs. M. J. Tracy, Inc.* 312 F. 2d 78 (2nd Cir 1962), Violation of the navigation laws gives rise to a presumption of negligence which, if not rebutted, may result in liability of the negligent party. (cites omitted). We think it is evident that the regulations pertaining to the obstruction of navigable waters were manifestly intended for the protection of private parties such as the libelant here, even though the enforcement of the provisions was vested in the United States."

See also: *Gulf Atlantic Transportation Company v. Becker County Sand & Gravel,* 122 F. Supp. 13 (1954); *Maier v. Publicker Commercial Alcohol Co.* 62 F. Supp. 161 (1945), Affd. 154 F. 2d 1020 (3rd Cir. 1946); *Converse v. Portsmouth Cotton Oil Refinery Co.* 281 F. 981 (U.S.C.A. 4th 1922); *Myrtle Point Transport Company v. Port of Cogsville River* (Sup. Ct. Oregon) 168 P. 625

(1917); *Chatfield v. City of New Haven* (C.C. Conn. 1901) 110 F. 788.

The foregoing cases establish that the assertion by the Plaintiffs of a cause of action for violation of the federal statute, even in the absence of an express provision for civil relief and even where the conduct is also criminal, is certainly not unique.

But more important, the great weight of authority under the Rivers and Harbors Act of 1899 clearly establishes the cause of action for damages and for injunctive relief that the Plaintiffs assert. Although the instant case is a case of first impression under its facts, the Fifth Circuit has held, in the only two cases known by Plaintiff to have been presented to it under the Rivers and Harbors Act of 1899, that the Act created private rights for enforcement and for damages in one damaged by a breach of the Act.

B. A PRIVATE CIVIL ACTION BROUGHT UNDER THE RIVERS AND HARBORS ACT OF 1899 IS AN ACTION ARISING UNDER THE LAWS OF THE UNITED STATES WITHIN THE MEANING OF THE FEDERAL JURISDICTION STATUTE.

Jurisdiction of the United States Courts arises under 28 U.S.C. §1331 and involves a federal question under §13 of the Refuse Act.

At the outset we submit that the existence of state law claims, remedies and forums could not deprive the court of jurisdiction. That the conduct of the Defendants gave rise to an action under state law was recognized by the Plaintiffs who joined state claims under the pendent jurisdiction doctrine of *United Mine Workers v. Gibbs* 383 U.S. 715 (1966). A quotation from that case may be helpful in demonstrating that the question of federal jurisdiction under a federal law is not affected by the availability of state claim remedies in state court. The Court said in

criticizing the use of *Hurn v. Ousler* langauge 289 U.S. at 246, 77 L. ed. at 1154 to limit pendent jurisdiction:

> "This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under (the) Constitution, the laws of the United States, and Treaties made, or which shall be made, under this authority. . . ." U. S. Const. Art. III §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the Court comprises but one constitutional 'case' 12"
>
> "12 The question whether joined state and federal claims constitute one 'case' for jurisdictional purposes is to be distinguished from the often equally difficult inquiry whether any 'case' at all is presented. *Gully vs. First Nat'l Bank* 299 U.S.C. 81 L. Ed. 70, 57 S.Ct. 96, although the issue whether a claim for relief qualifies as a case "arising under. . . the laws of the United States' and the issue whether federal and state claims constitute one 'case' for pendent jurisdiction purpose may often appear together. . . ."
>
> Resuming: "the federal claim must have substance sufficient to confer subject matter jurisdiction on the Court. (cites omitted) The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a Plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issue there is power in federal courts to hear the whole."

We do not believe it would be contested that one act can give rise to both state and federal claims, and it is without doubt that under our federal system both United States and state courts often have concurrent jurisdiction. As a consequence, a plaintiff quite often has the right to elect the forum in which to maintain his action. In this action the Plaintiff selected a federal forum.

The first case known to the Plaintiff involving a private federal question action under the Rivers and Harbors Act of 1899 is *Chatfield v. City of New Haven* (C. Ct. Conn. 1901) 110 F. 788. In this case an upper riparian landowner's free use of an intra-state waterway was obstructed by a bridge. The nondiverse plaintiffs brought a bill for an injunction against the continuance of the obstruction. The Secretary of War, in the exercise of his regulatory authority under the Act of 1899 had ordered a draw provided in the bridge but the city had not complied. After discussing the legislative history of the 1899 Act the Court held:

> ". . . .The right of private parties to invoke the aid of the courts of the United States to prevent this unreasonable obstruction to navigation, which produces an especial injury to them depends upon the effect which may be given to this statute. It is therefore, a case arising under the laws of the United States, and this court has jurisdiction to determine whether the bill has stated a cause of action which entitled the Complainants to relief." (cited omitted)
>
> "The two objections which are urged against the statute are that it is unconstitutional, and that, if valid, its effect is limited to a criminal prosecution by the United States against the Defendants"

After holding the Act constitutional the Court went on to hold that the bill had equity and overruled the demurrers to it:

> "The next point is that as the section does not authorize a suit in favor of private parties, no such authority exists. The question is not whether authority exists to bring the action in the district court in behalf of individuals, or whether authority is given to the attorney general to bring a bill in equity in behalf of the United States. It is conceded that such authority must be expressly conferred. But jurisdiction has always existed in the circuit court to have cognizance of suits of a civil nature between individuals which arise out of the laws of the United States when the

matter in dispute exceeds a specified sum, and, if a cause of action has thus arisen, no further or more specific authority is requisite."

In *U.S. v. Republic Steel* 362 U.S. 482 (1960) Justice Douglas says that the "void" — created by the decision in *Willamette Iron Bridge v. Hatch* 125 U.S. 1, (1888), in which it was held that there was no common law or statutory law of the United States that prohibited the obstruction of navigable waters, — was filled by the Rivers and Harbors Act of 1899.

As a matter of logic it must be that any right created in a private person for redress for violation of the Act — and we have seen numerous instances of resort to rights established by the 1899 act in the prior discussion — must arise under the laws of the United States. Indeed, the test of *Gully v. 1st Nat'l Bank* 299 U.S. 109, 111 (1936) that ". . .a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . .and "The right or immunity must be given such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . ." can hardly be more clearly met then under the instant complaint.

Thus, under similar circumstances in *Bell v. Hood,* 327 U.S. 678 (1964) in which the plaintiffs brought suit in the District Court for damages for violation of their Constitutional rights under the Fourth and Fifth Amendments arising from false imprisonment by agents of the F.B.I.— the District Court dismissed for lack of jurisdiction, the Circuit Court affirmed, the Supreme Court reversed.

The defendants contended that Plaintiff's action could be maintained under state law and did not raise a question under federal law and that there was no federal law giving rise to a cause of action for damages.

"Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. . . Before deciding there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover. . .under the laws of the United States. For to that extent the party who brings a suit is master to decide what law he will rely upon and. . .does determine whether he will bring a 'suit arising under' the . . . .laws of the United States. . ."

(There are two possible exceptions to this rule) "Where the (federal statutes clearly appear) to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

(The right to recover damages is not a frivolous question under federal law and the plaintiffs rights under the complaint) "will be sustained if the Constitution and laws of the United States be given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction."

To the same effect is *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,* 332 U.S. 210, supra, and *Fitzgerald v. Pan American,* 229 F. 2d 499, discussed supra, in which after holding that there was a private implied right of action under the Civil Aeronautics Acts the court continued:

"Although a right created by a federal statute covers the same ground as a right already existing under the common law of the states and territories, a suit based on that federal statute is one 'arising under' a law of the United States, so that a federal district court has jurisdiction. No federal common law of torts exists; when Congress enacts legislation rendering it tortious to do what is already a state common law tort, a suit based on that legislation is within 28 U.S.C. §1331."

It is to the federally protected rights under the Refuse Act that plaintiffs look in this action in the United States Courts to preserve and protect the streams and rivers flowing through their property.

CONCLUSION

The interests of the Republic, its people, and the petitioners require that this Court issue its writ of certiorari and reverse the decision of the Fifth Circuit.

Respectfully Submitted,

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APPENDIX

APPENDIX I

Pertinent Statutes and Regulations

1. 33 U.S.C. § 407

Deposit of refuse in navigable waters generally.

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise whereby navigation shall or may be impeded or obstructed: *Provided.* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officer supervising such improvement or public work; And *provided further,* That the Secretary of the Army whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him provided application is made to him prior to depositing such material; and whenever any permit is so granted the con-

ditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

2. 30 Stat. 1152, March 3, 1899

SEC. 13. That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

3. 25 Stat. 453

SEC. 6. That it shall not be lawful to cast, throw, empty, or unladen, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed. *Provided,* That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other materials used, or to be used, in or toward the building, repairing, or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be erected on the banks or sides of any port, harbor, haven, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable and for the best interests of such improvements, or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which

he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.

4. 28 Stat. 363

SEC. 6. That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy, or injure in any manner whatever any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, in navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks; any and every such act is made a misdemeanor, and every person knowingly engaged in or who shall knowingly aid, abet, authorize or instigate a violation of this section shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than twenty-five hundred dollars, and imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor.

APPENDIX II

Decision of Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2498

T. W. GUTHRIE, ET AL.,
Plaintiffs-Appellants,

versus

ALABAMA BY-PRODUCTS COMPANY, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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(March 28, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges

PER CURIAM: This is an appeal from the judgment of the district court dismissing appellants' complaint for want of federal question or diversity jurisdiction. Appellants primarily complain of the district court's holding that a private civil action brought by individuals damaged by defendants' polluting certain streams and rivers did

not state a federal right of action or supply federal question jurisdiction pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. § 407, unless defendants' conduct constituted an interference with navigation by which the plaintiffs were injured. We AFFIRM on the basis of the district court's well-reasoned opinion, reported at *328* F. Supp. *1140*.

AFFIRMED

APPENDIX III

District Court Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

T. W. GUTHRIE, et al., Plaintiffs	)	
vs.	)	CIVIL ACTION
ALABAMA BY-PRODUCTS COMPANY, a corporation, et al., Defendants	)	NO. 71-21

MEMORANDUM OPINION

Plaintiffs, as lower riparian landowners, seek damages and injunctive relief for alleged water pollution.

This action was filed on behalf of some 65 named plaintiffs "and all others similarly situated." Plaintiffs alledge that they are reparian landowners along the Warrior River, a navigable waterway, and some of its tributary creeks which run through the industrial valley of Birmingham. The defendants named in the original complaint are some 19 industrial corporations who, plaintiffs aver, discharge liquid wastes from their industrial plants into creeks emptying into the Warrior River. Plaintiffs allege that they own riparian lands downstream from the points where some or all of the defendants discharge such wastes; that they use these lands for both commercial and recreational purposes; and that the wastes discharged by defendants cause the waters of the Warrior River to be harmful and offensive to fish, wildlife, livestock and human beings, including the plaintiffs, and that as a consequence of this pollution the

use, value and enjoyment of their riparian lands have been impaired.

In the original complaint, federal jurisdiction is posted exclusively upon 28 U.S.C.A. § 1331, the theory being that the defendants are discharging the wastes complained of in violation of Section 13 of the Rivers and Harbors Appropriation Act of 1899.[1] In addition, plaintiffs contend that the defendants are liable for the same acts on common law theories of negligence, trespass and nuisance.

Defendants filed motions to dismiss the original complaint advancing the ground, inter alia that this court lacks jurisdiction over the subject matter of the action because the matter in controversy does not arise under the Constitution, laws or treaties of the United States within the meaning of 28 U.S.C.A. § 1331.

Plaintiffs thereafter filed three amendments to the complaint. The first such amendment alleges (a) diversity of citizenship between the plaintiffs and some, but not all, of the defendants, (b) that the State of Alabama has issued or provided for the issuance of permits to the defendants for their industrial waste discharges through the Alabama Water Improvement Commission, (c) that the complaint, as amended, raises a federal question under one of the Civil Rights Acts,[2] (d) that the complaint, as amended, raises a federal question under the 14th Amendment to the Constitution of the United States, and (e) class action allegations of the type sanctioned by Rule 23, F.R.C.P.

By two additional amendments, plaintiffs (a) strike two of the original plaintiffs and add fourteen new plaintiffs, (b) add three defendants, (c) assert jurisdiction under the 5th Amendment to the Constitution of the United States, (d) urge pendent jurisdiction of their non-federal claims,

[1] 33 U.S.C.A. § 407.
[2] 42 U.S.C.A. § 1983(d).

and (e) divide their claim into six separate counts, asserting claims which may be summarized as based upon violations of 33 U.S.C.A. § 407, negligence, willful and wanton misconduct, nuisance and deprivation of property and the enjoyment thereof in violation of 42 U.S.C.A. § 1983, the Fifth and Fourteenth Amendments of the United States Constitution.

Defendants refiled motions to dismiss the complaint as amended again adverting to the lack of federal question jurisdiction and the lack of diversity jurisdiction, inter alia. The court has considered the extensive briefs from all parties and the thoroughly excellent oral arguments of counsel, and has concluded that this court does not have jurisdiction of the subject matter of this action.

Diversity of Citizenship

The amended complaint discloses facially that some of the defendants are citizens of Alabama, as are the plaintiffs. A fundamental principle of federal diversity jurisdiction is that the diversity must be complete, so that all the plaintiffs are citizens of different states from all the defendants.[3] Plaintiffs' suggestion that the joinder of claims permitted by Rule 20, F.R.C.P., relieves the necessity of complete diversity will not do. There is no federal jurisdiction of this action based on diversity of citizenship. Moreover, since the lack of diversity is an actual defect, and not merely a formal one, it cannot be cured by a further amendment.[4]

Civil Rights Act
and U.S. Constitution

42 U.S.C.A. § 1983 gives a right of action to redress certain deprivations, under color of state law, of ". . . rights, privileges, or immunities secured by the Constitution and

[3] See, e.g. Strawbridge v. Curtiss, 7 U.S. 267 (1806).
[4] Russell v. Basila Manufacturing Co., 246 F.2d 432 (5th Cir. 1957).

laws . . ." of the United States. However, this civil rights statute is intended for the protection of personal liberties rather than for the protection of property rights.[5]

In this action plaintiffs sue as riparian landowners. All of the injuries complained of relate to plaintiffs' interests in real property. These are not the kinds of interests protected by 42 U.S.C.A. § 1983.

Another element that is essential to a claim under 42 U.S.C.A. § 1983 is that the action complained of be "under color" of state law. It is likewise necessary, in order to invoke the protection of the 14th Amendment, that there be "state action."[6] The only state action, or action under color of state law, alleged in the amended complaint, is that Alabama has created an agency known as the Water Improvement Commission and conferred upon it power to issue permits for the discharge of industrial liquid wastes and that some of the defendants are discharging the wastes complained of pursuant to such permits. Alabama's issuance of a permit for industrial waste discharges, even though the issuing agency has power to regulate or prohibit the discharges, is not the kind of state action which makes such discharges subject to the limitations of the 14th Amendment; nor does the fact that the defendants, or some of them, obtained such permits convert their discharges of industrial waste into action under color of state law within the ambit of the civil rights acts.[7]

[5] Hague v. C.I.O., 307 U.S. 496 (1939) (Justice Stone's opinion); Garren v. Winston-Salem, 439 F.2d 140 (4th Cir. 1971); National Land and Inv. Co. v. Specter, 428 F.2d 91 (3rd Cir. 1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969); Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968).

[6] Shelley v. Kraemer, 334 U.S. 1 (1948).

[7] Environmental Defense Fund v. Hoerner Waldrof, 1 Environment Reporter Cases 1640 (D. Mont. Aug. 27, 1970); Bright v. Isenbarger, 314 F.Supp. 1382 (N.D. Ind. 1970); Weyandt v. Mason's Stores, Inc., 279 F.Supp. 283 (W.D. Pa. 1968); Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D. N.Y. 1968); Pugliano v. Staziak, 231 F. Supp. 347, 351 (W.D. Pa. 1964) aff'd 345 F.2d 797 (3d Cir. 1965); Wood v. Hogan, 215 F.Supp. 53 (W.D. Va. 1963); Smith v. Jennings, 148 F.Supp. 641 (W.D. Mich. 1957).

The 5th Amendment to the Constitution of the United States applies to action of the federal government. Plaintiffs do not allege a federal permit or any other basis for attributing responsibility for the industrial waste discharges complained of to the federal government.

Accordingly, the amended complaint does not present a controversy which arises under 42 U.S.C.A. § 1983, or under the 5th or 14th Amendments to the United States Constitution.

The Rivers and Harbors Appropriation Act of 1899

Plaintiffs have urged with great emphasis that there is federal question jurisdiction on the ground that the amended complaint presents a controversy arising under Section 13 of the Rivers and Harbors Appropriation Act of 1899.[8] Plaintiffs allege that the defendants' discharges are "refuse" within the meaning of 33 U.S.C.A. § 407, and that the defendants ". . . on divers dates continuing up until the date of filing this claim deposited refuse into tributaries of navigable waters from which said refuse floats into navigable waters without first obtaining permits from proper United States authorities for the discharge of said refuse materials into said tributaries or navigable waters all in violation of Title 33, U.S.C.A. Sec. 407."

Assuming, arguendo, that the amended complaint charges violations of 33 U.S.C.A. § 407, it does not follow that plaintiffs' claim of injuries resulting from conduct which violates 33 U.S.C.A. § 407 "arises under" that statute in a sense that confers federal court jurisdiction of this action under 28 U.S.C.A. § 1331. The test of whether a claim "arises under" the laws of the United States is not a precise one. It is clear, however, that something more than mere reference to a federal statute is required. Perhaps the

[8] 33 U.S.C.A. § 407.

most frequently quoted statement of basic guiding principles can be found in the Justice Cardozo's opinion in *Gully v. First National Bank,* 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936).

> How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United State must be an element and an essential one, of the plaintiff's cause of action . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they receive another . . . (citations omitted).
>
> 299 U.S. at 112-113

In *Shulthis v. McDougal,* 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912), the Court stated:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the results depend.
>
> 225 U.S. at 569

In *Johnston v. Byrd,* 354 F.2d 982 (5th Cir. 1965), a case involving a controversy regarding title to personal property within Alabama, the Court stated:

> State law determines that question, not federal law. A question of federal law is often 'lurking in the background' of every case. In order to invoke the jurisdiction of a federal court there must be 'a substantial claim founded "directly" upon federal law.'
>
> 345 F.2d at 984

With these principles in mind, it is necessary to examine the basis of plaintiffs' right of action and the effect thereon, if any, of 33 U.S.C.A. § 407.

First, it is clear that the plaintiffs' right to relief does not depend exclusively upon the existence of 33 U.S.C.A. § 407, or upon whether the defendants are violating that statute. The law of Alabama recognizes a right of action for past damages, as well as a right to injunctive relief to prevent future damages, for impairment of the value and enjoyment of riparian lands resulting from water pollution. [9] Plaintiffs contend, however, that 33 U.S.C.A. § 407 grants a federally created cause of action for the same injury and entitles plaintiffs to the same relief as that available under the state common law causes of action. Plaintiffs concede that neither 33 U.S.C.A. § 407 nor any other part of the Rivers and Harbors Act expressly provides for a private civil remedy. Rather, they rely on the principle that a civil remedy for violation of a penal statute may be implied in favor of persons in the class for whose special benefit the statute was enacted. The court recognizes this as a sound principle of law, but its applicability depends upon whether the plaintiffs are within the class of persons for whose special benefit the statute was enacted and the statutory enactment was for the purpose of protecting against the type of harm or injury which has in fact occurred.[10]

A careful review of the Rivers and Harbors Appropriation Act of 1899, its legislative history, its administrative interpretation and its judicial gloss has convinced this court that 33 U.S.C.A. § 407 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water polution that have traditionally been dealt with under the law of nuisance.

[9] See, e.g., Montgomery Limestone Co. v. Bearden, 256 Ala. 269, 54 So. 2d 571 (1951), and Tutwiler Coal, Coke & Iron Co. v. Nichols, 146 Ala. 364, 39 So. 762 (1905).

[10] See Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39 (1969); Fitzgerald v. Pan American World Airways, 229 F.2d 499, 501 (2d Cir. 1956); Kardon v. National Gypsum Co., 69 F.Supp. 512, 513 (E.D. Pa. 1956).

The Act of 1899 included provisions regulating all kinds of construction in navigable waters,[11] providing for establishment of harbor lines and prohibiting encroachments,[12] regulating the creation and providing for removal of all kinds of obstructions in navigable waters,[13] regulating deposits of refuse in and adjacent to navigable waters,[14] and prohibiting injuries to river and harbor improvements.[15] Provisions were also made for enforcement of the act by criminal penalties.[16] It is clear that these provisions were part of the efforts by Congress to maintain the nation's navigable waterways, as routes of commerce, free from obstructions.

A similar view was expressed by the Supreme Court in a recent opinion involving this legislation, as follows:

> Article 1, § 8 of the Constitution grants to Congress the power to regulate commerce. For the exercise of this power the navigable waters of the United States are to be deemed the "public property of the nation and subject to all the requisite legislation by Congress." . . . the federal government is charged with insuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction. . . . the Rivers and Harbors Act of 1899, an assertion of the sovereign power of the United States, . . . was obviously intended to prevent obstructions in the nation's waterways. Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad . . . and we have found that a principal beneficiary of the Act, if not the principal beneficiary, is the government itself. (citations omitted).
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> Wyandotte Transportation Co. v. United States, 289 U.S. 191, 88 S.Ct. 379, 19 L.Ed. 2d 407 (1967)

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[11] 33 U.S.C.A. §§ 401, 406.
[12] 33 U.S.C.A. § 404.
[13] 33 U.S.C.A. §§ 403, 409, 414-15.
[14] 33 U.S.C.A. § 407.
[15] 33 U.S.C.A. § 408.
[16] 33 U.S.C.A. §§ 411-413.

This court concludes that the purposes and extent of the Rivers and Harbors Act was to assist the federal government in insuring that our navigable waterways remain free of obstruction and to protect the special interest in freedom from such obstructions of those who use the nation's waterways for purposes of navigation. Numerous judicial decisions have held that violation of the penal provisions of the 1899 Act with resulting injury to rights of navigation or anchorage can be the basis of a federal right of action, either within general admiralty jurisdiction or as an implied federal cause of action.[17]

On the other hand, no court has recognized a federally created right of action under the 1899 Act where the interest to be protected is unrelated to rights of navigation or anchorage. The few decisions considering the matter have consistently denied that such a federally-created right of action exists.[18]

Plaintiffs rely heavily upon *Alameda Conservation Association v. California,* 437 F.2d 1087 (9th Cir. 1971). This decision is not regarded as persuasive on the issue before this court because in Alameda several alternate bases of federal jurisdiction were alleged and the only question discussed in the opinion was that of the plaintiffs' standing to sue. Since plaintiffs in the present case are complaining of injury to their private property, they clearly have stand-

[17] See Acme Boat Rentals v. J. Ray McDermott & Co., 424 F.2d 393 (5th Cir. 1970); Tatum v. Blackstock, 319 F.2d 393 (5th Cir. 1963); Neches Canal Co. v. Miller & Vidor Lumber Co., 24 F.2d 763 (5th Cir. 1928); Converse v. Portsmouth Cotton Oil Ref. Co., 281 Fed. 981 (4th Cir. 1922); American Zinc Co. v. Foster, 313 F.Supp. 671 (S.D. Miss. 1970); Lauritzen v. Chesapeake Bay Bridge & Tunnel District, 259 F. Supp. 633 (E.D. Va. 1966); Gulf Atlantic Transportation Co. v. Becker County Sand & Gravel, 122 F.Supp. 13 (E.D. N.C. 1954); Maier v. Publicker Commercial Alcohol Co., 62 F.Supp. 161 (E.D. Pa. 1945); Chatfield v. New Haven, 110 F. 788 (D. Conn. 1901).

[18] See, e.g., H. Christiansen & Sons, Inc. v. City of Duluth, 154 F.2d 205 (8th Cir. 1946) and Chambers-Liberty Counties Nav. Dist. v. Parker Bros & Co., 263 F.Supp. 602 (S.D. Tex. 1967).

ing to sue for such injury. Morevore, in *Alameda* the involvement of various sections of the Rivers and Harbors Act was on account of the filling or obstruction of large portions of San Francisco Bay. Such activity is clearly within the federally protected sphere of navigation and anchorage.

It is the court's opinion that the foregoing conclusion with respect to purposes and intent of the Rivers and Harbors Appropriation Act of 1899 is sound and fully supported by the legislative and administrative history of the Act. Section 407, like the other sections of the Rivers and Harbors Act, was enacted for the purpose of protecting navigation and anchorage and not as a general pollution control statute or to create a private right unrelated to navigation or anchorage. The Rivers and Harbors Appropriation Act of 1899 was adopted following a report to Congress by the Secretary of War which, at the prior direction of Congress, contained a compilation of existing laws relating to navigable water.[19] Section 13 (33 U.S.C.A. § 407) was derived from two pre-existing statues: an 1890 Act which made it unlawful to empty into navigable waters ". . . any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind . . . *which shall tend to impede or obstruct navigation* . . ."[20] (26 Stat. 453) and an 1894 Act which prohibited deposits in harbors and rivers for which Congress had appropriated money for improvements, of ". . . ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state."[21] See *United States v. Standard Oil Co.*, 384 U.S. at 227-8 (1966).

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[19] See United States v. Republic Steel Corp., 362 U.S. 482, 486 (1960).

[20] 26 Stat. 453.

[21] 28 Stat. 363; 33 U.S.C.A. § 407 at p. 101 (1970).

Although the Act of 1894 did not contain a concluding phrase like that in the Act or 1890, the legislative history of the 1894 Act makes it clear that its purpose was to prohibit the discharge of materials which were reducing channel depths and making necessary expensive dredging. See 26 Cong. Record 4376—(House, May 3, 1894). Moreover, the 1894 Act was construed by the Attorney General of the United States in 1896 as being subject to the same limitation. A group of mine operators applied to the Secretary of War for designation of an area where they could dump ore washings without violating the 1894 Act. The Secretary determined that discharge of the ore washings would *not* affect navigability of the river. However, because of opposition by parties contending that the discharge ". . . destroys the fish, pollutes the water so as to destroy its usefulness for domestic purposes, and injuries scenery along the stream . . . ," the Secretary asked the Attorney General whether he was required to act on the application and whether he should consider matters other than the affects on navigation. The Attorney General replied:

> I am of the opinion that it is your duty to act upon the application. If you should decline to act in this and similar cases the above section would operate as an absolute prohibition. This was not the intention of Congress. * * * You should, therefore, be governed only by considerations affecting the navigation of the rivers.
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> 21 Op. Atty. Gen 305, 307-8 (1896)

With this Attorney General's opinion forming a part of the background, the House Conferees said of the compilation which became the Act of 1899 that it contained ". . . no essential changes in existing laws." 32 Cong. Record 2923 (House). The fact that the Act of 1899 made no substantive change in the pre-existing statutes has been recognized by the Supreme Court. *United States v. Republic*

Steel Corp., 362 U.S. at p. 486 n. 4; *United States v. Standard Oil Co.*, 384 U.S. at p. 228. Certainly a provision intended to create a federal cause of action in favor of riparian landowners for impairment of the value and enjoyment of their riparian lands unrelated to impairment of rights of navigation would have been a major substantive addition to the pre-existing statutes.

The Congressional debates on the Rivers and Harbors Appropriation Act are consistent with this construction and include assurances by one of its supporters that it would ". . . simply revise and make clearer and more definite laws that have already been enacted . . ." and that it was ". . . better adapted to serve the interests of *commerce and navigation* than the laws in their present form." 32 Cong. Record 2297 (Senate, Feb. 24, 1899). No reported case of which this Court is aware, during the more than three-quarters of a century since its original enactment, has held that Section 407 created any private right unrelated to the special federal interest in protecting navigation.

The statute by its very wording makes any other construction most improbable. It prohibits all discharge of refuse regardless of quantity or quality, but then authorizes the appropriate federal official to permit the discharge of all such refuse regardless of quantity or quality "whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby." Any right or injury, unrelated to interference with rights of navigation, is outside the special federal interest and protection covered by the Rivers and Harbors Act.

Not only is this important in determining the legislative intent, but it also points up that Section 407, if related at all to plaintiff's action, is merely tangential. The damages plaintiffs claim to have suffered result from the material alleged to have been discharged into the streams and not from any failure to have permits for their discharge. Plaintiffs' injuries would be no less, if the same discharge were

made with federal permits after determination that such discharges would not injure anchorage or navigation. The fact that the same material is discharged without a permit adds nothing to plaintiffs' injury or right of action.

The long-standing administrative construction of 33 U.S.C.A. § 407, while not conclusive as to the proper construction, is entitled to "great weight" in construing the Act.[22] As recently as 1968, the Code of Federal Regulations included the following provisions as part of the Corps of Engineers' regulations on depositing refuse in navigable waters:

> Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), prohibits the deposit in navigable waters generally of 'refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.' *The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation.* Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation.
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> 33 C.F.R. § 209.395 (1968)

All of this leads the Court to conclude that although Section 407 may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even from deposits in violation of Section 407, does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction in this case.

This conclusion highlights the analogy between 33 U.S.C.A. § 407 and the Safety Appliance Acts.[23] Violation

[22] United States v. Republic Steel Corp., 362 U.S. 482, 491 (1960).
[23] 45 U.S.C.A. § 1, et seq.

of those acts resulting in injury to railroad employees, the special class sought to be protected, is the basis of a federally created cause of action under the Federal Employers' Liability Act.[24] However, there is no such federal cause of action in favor of persons other than railroad employees who may be injured as the result of conduct which violates these same federal statues. For example, in cases growing out of railroad crossing collisions, and other accidents not involving railroad employees, one of the recognized grounds of negligence in a state common law cause of action is defendant's violation of the Federal Safety Appliance Acts. Such violations have been advanced as a basis for federal court jurisdiction on the theory that, because such a violation is alleged to have proximately caused the injury sued for, the action arises under a federal statute. However, it is uniformly held that there is no federal jurisdiction of such actions under 28 U.S.C.A. § 1331.[25]

This court is not unmindful of the increasing interest and concern at all levels of government with environmental and ecological problems. All agencies of the federal government are now required under legislation such as the National Environmental Policy Act of 1969[26] and the Fish and Wildlife Coordination Act[27] to take into consideration the ecological and environmental impact of any of its actions. Recent establishment of a federal permit program under 33 U.S.C.A. § 407 based on general environmental criteria apparently has its foundation in the policies and requirements of such recent legislation. This is made clear by the reasoning and holding of the Court in *Zabel v. Tabb*,

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[24] 45 U.S.C.A. § 51, et seq.

[25] Crane v. Cedar Rapids & I.C.R. Co., 395 U.S. 164 (1969); Jacobson v. N.Y.N.H. & H.R. Co., 206 F.2d 153 (1st Cir. 1953) aff'd 347 U.S. 909 (1959); Andersen v. Bingham & G. Ry. Co., 169 F.2d 328 (10th Cir. 1948); Owens v. N.Y.C.R. Co., 267 F.Supp. 252 (E.D. Ill. 1967); Boncek v. Penn R. Co., 105 F.Supp. 700 (D. N.J. 1952).

[26] 42 U.S.C.A. §§ 4331-4347.

[27] 16 U.S.C.A. §§ 661, 662.

430 F.2d 199 (5th Cir. 1970). However, there is nothing in such legislation to suggest that Section 407 was intended to create a private right of action for the kind of injuries these plaintiffs claim to have sustained. In addition, the court is informed that both Houses of Congress now have before them a number of versions of a bill introduced by Senators Hart and McGovern (S.1032) allowing any person to bring suit in the federal courts against either federal agencies or private defendants to challenge conduct alleged unreasonably to result in environmental pollution. Though this circumstance may be only faintly persuasive, it does indicate that the sponsors of these bills believe that the right to maintain such suits in federal court is not provided by existing legislation. This court is firmly of the opinion that if plaintiffs are to be allowed to bring private damage suits for injuries traditionally local in nature and already covered by local statutory and common law, additional federal legislation is imperative. Such authority cannot be found in the existing law.

Convinced for the reasons above set forth that this court lacks jurisdiction of this action, it is unnecessary and would be inappropriate to consider the other issues raised by defendants' motions to dismiss. An order will be entered dismissing the action for lack of federal jurisdiction.

This, the 21st day of June, 1971.

SEYBOURN H. LYNNE

Chief Judge

APPENDIX IV

Judgment of District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

T. W. GUTHRIE, et al., Plaintiffs	)	
vs.	)	CIVIL ACTION
ALABAMA BY-PRODUCTS COMPANY, a Corporation, et al., Defendants	)	NO. 71-21

JUDGMENT

In conformity with the opinion of the Court contemporaneously filed herewith,

It is ORDERED, ADJUDGED and DECREED by the Court that this action be and the same is hereby dismissed for lack of jurisdiction.

DONE this 21st day of June, 1971.

SEYBOURN H. LYNNE
Chief Judge

APPENDIX V

BNA ENVIRONMENT REPORTER
Monograph No. 11

THE BUREAU OF NATIONAL AFFAIRS, INC.
January 28, 1972 Volume 2, No. 39

THE REFUSE ACT OF 1899

By Ray M. Druley

INTRODUCTION

Section 13 of the Rivers and Harbors Act of 1899, known as the Refuse Act,[1] has become an important part of the federal water pollution abatement program.

Russell Train, chairman of the President's Council on Environmental Quality (CEQ) called the initiation of the Refuse Act permit program the "single most important step" the U.S. has taken to abate water pollution.[2] The irony of the Refuse Act's importance in present water pollution programs prompted Timothy Atkeson, general counsel of CEQ, to refer to the act as, "that sparkling innovation in antipollution legislation of the McKinley Administration."[3]

The utilization of the Refuse Act for water pollution control is to a great extent the result of weaknesses of the

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[1] Act of March 3, 1899, Sec. 13, 30 Stat. 1152, as amended, 33 U.S.C. Sec. 407 (1964); Environment Reporter — Federal Laws 75:5501. [References to Federal Laws and Environment Reporter — Federal Regulations are subject to change.]

[2] In a press conference December 23, 1970; 1 Environment Reporter — Current Developments 910.

[3] Speech to ALI-ABA Seminar on Environmental Law, Smithsonian Institution, Washington, D.C., January 28, 1971, *Hearings on Refuse Act Permit Program before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess., ser. 92-7, at 153 (1971). [Hereinafter cited as *Refuse Act Hearings*].

Federal Water Pollution Control Act (FWPCA).[4] President Nixon called the enforcement machinery of the FWPCA "cumbersome,"[5] and the General Accounting Office,[6] Environmental Protection Agency,[7] environmental organizations,[8] and writers have agreed.[9]

The principal weaknesses in the enforcement machinery of the FWPCA are: (1) the Government must give a violator of water quality standards 180 days notice prior to bringing court action, (2) the FWPCA applies only to interstate waters which comprise only about 14 percent of all waters in the United States, (3) the FWPCA provides for the establishment of "stream standards" for a body of water, and not "effluent standards," standards prescribed for the source of the discharge. Pending legislation would strengthen FWPCA. Only one court action for violation of water quality standards has been brought under the FWPCA.[10]

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[4] 33 U.S.C. Sec. 1151, et seq.; Environment Reporter — Federal Laws 71:5101.

[5] President Nixon's Message to Congress, February 10, 1970, Environment Reporter — Federal Laws 21:0201.

[6] General Accounting Office, *Controlling Industrial Water Pollution — Progress and Problems* (1970).

[7] *Hearings on Water Pollution Control Legislation — 1971 (Oversight of Existing Programs) Before the House. Comm. on Public Works* 92nd Cong., 1st Sess., pt. 1, at 557-575 [hereinafter cited as *Water Pollution Oversight Hearings*].

[8] *Hearings on Bills Amending the Federal Water Pollution Control Act and Other Pending Legislation Relating to Water Pollution Control, Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92nd Cong., 1st Sess., ser. 92-H9, pt. 2, at 607-697.

[9] Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation,* 46 N.Y.U.L. Rev. 304, 319-323 (1971); Barry, *The Evolution of Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulties in Developing Effective Legislation,* 68 Mich. L. Rev. 1103 (1970); Note, *Water Quality Standards in Private Nuisance Actions,* 79 Yale L.J. 102 (1969); Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality,* 52 Iowa L. Rev. 186 (1966).

[10] Stein, *The Actual Operation of the Federal Water Pollution Control Administration,* 3 Natural Res. Law 41, 46 (1970).

The mercury crisis emphasized the usefulness of the Refuse Act and weaknesses of the FWPCA. In the summer of 1970 reports of mercury contamination of fish from Japan and Sweden were followed by reports of mercury contamination of fish in the U.S., resulting in the outlawing of fishing in many lakes and rivers.[11] Upon recommendation of the Department of Interior, civil actions for injunctive relief under the Refuse Act were filed against 10 companies to halt discharge of mercury.[12] Nine of the 10 companies agreed to stipulated judgments, which in general limited mercury discharges to one-half pound per day.[13] The other company went out of business.[14]

Figures released by the EPA general counsel reflected the success of the actions.[15] The mercury discharges of the companies were reduced from 139 pounds per day to two pounds per day. In addition, 50 industrial mercury dischargers reduced their mercury discharges by 86 percent as of September 17, 1970, and by 97 percent according to a later EPA analysis.

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[11] A State-by-state Pollution Survey, *Hearings on Mercury Pollution and Enforcement of the Refuse Act of 1899 Before the Subcomm. on Conservation and Natural Resources of the House on Government Operations,* 92nd Cong., 1st Sess., pt. 1, at 424-442 (1971) [hereinafter cited as *Mercury Enforcement Hearings*]; *See also Hearings on the Effects of Mercury on Man and The Environment Before the Subcomm. on Energy, Natural Resources and the Environment of the Senate Comm. on Commerce,* 91st Cong., 2nd Sess., ser. 91-73, pts. 1-3 (1970).

[12] Department of Interior press release, July 24, 1970; Justice Department press release, July 24, 1970.

[13] Justice Department press release, October 29, 1970; Georgia-Pacific Corporation, Bellingham, Wash.; Olin Mathieson Chemical Corporation, Niagara Falls, NY.; Weyerhaeuser Company, Longview, Wash.; Olin Mathieson Chemical Corporation, Augusta, Ga.; Diamond Shamrock Corporation, Delaware City, Del.; Diamond Shamrock Corporation, Muscle Shoals, Ala.; Allied Chemical Company, Solvay, N.Y.; International Mining and Chemical Company, Chlor-Alkali Division, Orrington, Me.; and Pennwalt Chemical Company, Calvert City, Ky.

[14] Justice Department press release, October 29, 1970; Oxford Paper Company, Rumford, Maine.

[15] *Mercury Enforcement Hearings, supra* note 11, at 46-71.

The effectiveness of the Refuse Act in relieving the mercury crisis was because of the Act's broad prohibitions and simple, effective enforcement machinery. The Act forbids: (1) the discharge into navigable waters or their tributaries "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" and (2) the depositing of "material of any kind in any place on the bank of any navigable water or tributary where the same shall be liable to be washed into such navigable water. . .,whereby navigation shall be impeded or obstructed."

A proviso to the Act authorizes "the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured. . .,to permit the deposit of any material. . .in navigable waters, within limits to be defined and under conditions to be prescribed by him."

Section 16 of the Rivers and Harbors Act of 1899[16] provides that violation of the Refuse Act constitutes a misdemeanor punishable by a fine of no less than $500 and no more than $2,500 or by imprisonment of not less than 30 days nor more than one year. In addition, section 16 provides that "one-half of said fine [is] to be paid to the person or persons giving information which shall lead to conviction."

Section 17 places the responsibility for enforcement of the Act with the Justice Department.[17]

LEGISLATIVE HISTORY

The threshold issue in any consideration of the Refuse Act is, what constitutes "any refuse matter of any kind or description whatever"? The question is, does the Act prohibit the discharge of matter which pollutes the water but

[16] 43 U.S.C. Sec. 410.
[17] 43 U.S.C. Sec. 411.

does not obstruct navigation? The U.S. attorney for the Western District of Pennsylvania has termed this the "pollution vs. navigation argument."[18]

A starting point, but only a starting point, on this issue is the legislative history of the Act. The Act is a codification of two prior statutes — Section Six of the 1890[19] and 1894[20] Rivers and Harbors Acts, which were based on the 1886[21] and 1888[22] New York Harbors Act. (The text of the four acts as follows as appendix A.)

The 1890 Act was the first general legislation for protection of navigable waters.[23] The Act was prompted by the U.S. Supreme Court's opinion holding that the Government had no common law authority to protect navigable waters from obstructions.[24]

Judge G. W. Koonce, who was with the Army Corps of Engineers from 1886 through 1926, described the background of the 1890 Act as follows:

> While a broad and systematic policy of river and harbor improvement was early adopted and pursued uninterruptedly. . .,it seems not to have occurred to the legislative mind that protection of waterways from trespass and obstruction was as vital and important as improvement. It was well understood of course that the power of Congress to regulate and improve navigable waters included the power to keep them open and free from obstructions to their navigation, to remove such obstructions as exist and provide against their recurrence; and that it was for Congress to determine when its full power would be brought into activity. Nevertheless, it

[18] Brief in Opposition to Motion to Dismiss, United States v. U.S. Steel Corp., No. Crim. 71-74, at 8, filed July 22, 1971 (W.D. Pa.).

[19] 26 Stat. 453.

[20] 28 Stat. 363.

[21] 24 Stat. 329.

[22] 25 Stat. 209.

[23] United States v. Standard Oil Co., 384 U.S. 224, 1 ERC 1033, 1035 (1966) (dissenting opinion).

[24] Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

is a historic fact that for nearly a century this power which clearly existed in Congress lay dormant and unexercised. In the meantime, while the Government was expending hundreds of millions of dollars to increase the facilities of navigation, interested parties, including states, corporations, and individuals, were placing obstructions and impediments of all kinds in and across the improved waterways. The necessity for federal legislation to protect these waterways from impairment and ultimate destruction eventually became urgent. Prior to 1890, efforts along this line were sporadic, fragmentary, and directed chiefly to the suppression of some obnoxious local practice.[25]

Debate on the substantive provisions of Section 6 of the 1890 Act was overshadowed by the extensive debate on Section 7, now Section 10, concerning dredge and fill activities in navigable waters.[26]

In support of a favorable recommendation of HR 394, which became section Six of the 1890 Act, the House Committee on Rivers and Harbors[27] referred to an 1889 report of the Army Corps of Engineers that called attention "to the necessity for legislation to prevent the obstruction of navigable waters and to protect public works against trespass or injury." The committee report also incorporated a letter dated January 13, 1877, which mentioned "instances of serious injury to navigable waters by the discharge of sawmill waste into streams" and to "channels . . . from deposits of ballast, steam-boat ashes, oysters, and rubbish from passing vessels." The letter also said, "The special act of Congress (see vol. 18, Statutes at Large, part 3, p. 50) for the protection of the work in progress for the im-

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[25] Lecture by Judge G. W. Koonce, Federal Laws Affecting River and Harbor Works, Company Officer Class, The Engineer School, Fort Humphreys, Va., April 23, 1926, *Water Pollution Oversight Hearings, supra* note 7, at 284-291.

[26] United States v. Republic Steel Corp., 362 U.S. 482, 1 ERC 1022 (1960).

[27] H. R. Rep. No. 477, 51st Cong., 1st Sess. (1890).

provement of the mouths of the Mississippi by dredging has proved defective, inasmuch as it requires proof of malice or intention, instead of injury or impediment to navigation."

The Senate bill (S 88) was amended by the Senate to conform with HR 394 by adding to the list of prohibited substances "slag, cinders, ashes, refuse, and waste," and by changing the clause "which shall impede or obstruct navigation" to "which shall tend to impede or obstruct navigation."[28] Both bills were passed as Section 6 of the Rivers and Harbors Act of 1890 with no significant debate over their provisions. However, it is clear only from the wording of the Act but also from the meager legislative history that the 1890 Act intended to prohibit only discharges "which tend to impede or obstruct navigation."

The legislative history of Section Six of the 1894 Act is equally limited. A draft of Section Six of the 1894 Act was submitted to Congress because of a complaint that rubbish was being dumped into Savannah Harbor, Ga., and that works of improvement were being injured by vessels navigating the waters.[29] It was claimed that the 1890 Act did not provide an effective remedy. General O. M. Carter of the Army Corps of Engineers, in submitting a draft of the bill that was based on the New York Harbor Act of 1888, said, "It is quite important that there should be some effective method of enforcing the prohibition relating to the depositing of refuse and the injuring of works of improvement in navigable waters of the United States."[30]

In justification for Section 6 of the 1894 Act being included in an appropriations bill, Congressman Grovenors, sponsor of the bill, said that the bill was designed to prevent the filling up of harbors with refuse requiring the

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[28] 21 Cong. Rec. 1319 (1890).
[29] H.R. Doc. No. 123, 54th Cong., 2d Sess. (1894).
[30] *Id.*

appropriation of additional money for dredging.[31] He said, "[C]ertainly [our jurisdiction covers] the question of the filling up of the navigable waters by deposits made in harbors or in rivers, . . .matters which relate strictly to the improvement and maintenance of navigation."

Congressman Catchings mentioned that the bill was a further provision for enforcing the 1888 New York Harbor Act "to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City."[32] He noted that large amounts of "city refuse, cellar dirt, garbage, ashes, etc." were being dumped into New York Harbor – 9,000,000 cubic yards in 1893 — and said, "The provision in the pending bill is intended simply to regulate the disposition of that enormous mass of refuse material."

This was the extent of the debate in either house on the bill that was passed as Section Six of the 1894 Act. The 1894 Act did not include the concluding phrase, "which shall tend to impede or obstruct navigation." It did include a general clause after the enumerated items, prohibiting the discharge "of any other matter," which was not included in the 1894 Act.[33]

In 1896 the U.S. attorney general issued an opinion[34] interpreting the 1894 Act, in response to an inquiry from the secretary of War concerning a permit application from a group of mine operators who wanted to discharge ore washings without violating the 1894 Act. The secretary of War determined that navigation would not be affected by the discharge, but there was opposition to issuance of the permit by parties contending that the discharge "destroys the fish, pollutes the water so as to destroy its usefulness for domestic purposes, and injures scenery along the stream." The secretary asked the attorney general whether

[31] 26 Cong. Rec. 4358 (1894).
[32] *Id.* at 4376.
[33] *See* Appendix A.
[34] 21 Op. Atty. Gen. 305.

he was required to act on the application and whether he should consider matters other than effects on navigation. The attorney general replied that the secretary was required to act on the application; otherwise, the attorney general said, the Act "would operate as an absolute prohibition." According to the attorney general, "This was not the intention of Congress." He instructed the secretary, "You should, therefore, be governed only by considerations affecting the navigation of the rivers."

The conclusion to be drawn from the attorney general's opinion, the wording of the Act, and the limited debate on its provisions, is that Section Six of the 1894 Act prohibited discharges, without a permit, that did not impede navigation, but the purpose of the Act was limited to protecting "the navigation of rivers." The prohibitions of the Act were broader than its purpose, resulting in the corps having administrative authority over all discharges.

As noted above, the Refuse Act is a codification of the 1890 and 1894 Acts. The codification was made pursuant to a directive in the 1896 Rivers and Harbors Act, which directed the secretary of War to prepare "a compilation of all general laws . . . for the maintenance, protection, and preservation of the navigable waters of the United States, and to submit the same to Congress with such recommendation as to revision, emendation or enlargement of the said laws as in his judgment would be most advantageous to the public interest."[33]

A draft of the codification and compilation of prior laws was transmitted to Congress on February 13, 1897, by the Army Corps of Engineers.[34] The letter of transmittal incorporated a letter by John M. Wilson, chief of the corps, that said the codification, consisting of 13 sections, was "believed to be clear and free from ambiguity, and better

[33] 29 Stat. 234.
[34] H.R. Doc. No. 293, 54th Cong. 2nd Sess. (1899).

adapted to conserve the important interests of commerce and navigation."

No action was taken upon the draft codification for over two years and then it was passed by the House of Representatives as a measure independent of the Rivers and Harbors Act. Lieutenant Colonel A. MacKenzie of the Army Corps of Engineers then transmitted a copy of the bill, passed by the House, to the Senate on February 17, 1899, with the statement that "these sections contain no new matter but simply revise and make clearer and more definite laws that have been already enacted."[37] Senator Fry, chairman of the Senate Commerce Committee and sponsor of the bill, reiterated the assurances of Colonel MacKenzie and said, "There are not ten words changed in the entire thirteen sections."[38]

Senator Fry's assurances foreclosed any significant debate on the substance of the bill.[39] The bill was passed by the Senate exactly as submitted by the corps and became sections nine to 21 of the Rivers and Harbors Act of 1899.

The House Conference Report on the Act said, "The bill as now agreed upon and presented also includes a codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing laws."[40]

Section 13 of the 1899 Act was a composite of both the 1890 and 1894 Acts.[41] It substituted the term "any refuse matter of any kind or description whatever," for the enumerated lists in the prior bills. It adopted the streets and sewers exception in the 1894 Act. It omitted the 1890 limitation — "which shall tend to impede navigation" — from the first clause but included it in the second clause, which

[37] *Id.*
[38] 32 Cong. Rec. 2296 (1899).
[39] *Id.*
[40] 32 Cong. Rec. 2923.
[41] *See* Appendix A.

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is separated from the first with a semicolon. The reason for these inclusions and omissions is not known.

It is clear that the main purpose of the Refuse Act of 1899 was to protect the navigability of rivers and harbors. As the U.S. Supreme Court stated in *United States v. Wyandotte Transportation Co.*:[43] "The Rivers and Harbors Act of 1899, an assertion of the sovereign power of the United States, . . . was obviously intended to prevent obstruction in the Nation's waterways." There were state statutes in effect in 1899 to prevent water pollution,[44] and the concern over water pollution in 1899 is undeniable, but the fact remains that there was no discussion of the problem in relation to the Refuse Act.[45]

This does not mean that the Act does not and did not intend to prohibit all discharges of refuse, without a permit, regardless of whether they obstructed navigation. In fact, the legislative history does show that the drafters and sponsor of the Act wanted to make it as broad as possible to insure that it would be effective in protecting the navigability of waters. This is evidenced by the dissatisfaction with the 1890 Act which prohibited by the discharge of substances that tended to impede navigation. The broadness of the entire Rivers and Harbors Act of 1899 is emphasized by Mr Koonce, who was one of the drafters of the Act, as follows:

> It was intended to be, and is, an assertion of police power to protect from physical injury those highways of commerce in which the Federal Government has dominion and propriety, and within its comprehensive provisions are embraced all forms and varieties of physical obstructions. An examination and study of the law will impress anyone with the organic and far reaching character of

[43] 389 U.S. 191 (1967).

[44] Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761, 771-772 (1971).

[45] Eames, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*, 1 Ecology L. Q. 173, 181, n. 54 (1971).

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the jurisdiction asserted and with its evident value both as a preventive and remedial measure.[45]

Mr. Koonce then said that, "Under . . . section 13, relating to the discharge of [sic] deposit of refuse matter in navigable water the commission of any of the acts forbidden, not their results, constitute the offense, and the commission subjects the offending party to the prescribed penalty, *regardless of whether or not there is any actual injury to navigation.*" (Emphasis added.) He then added that discharges that did "no material public injury" were not normally prosecuted and that the corps considered only effects upon navigation in determining whether to issue or deny a permit.

[45] *Supra* note 25.

VERSUS

ALABAMA BY-PRODUCTS COMPANY, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF KOPPERS COMPANY, INC., RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI

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In the Supreme Court of the United States

No. 71-1672

T. W. GUTHRIE, ET AL,
PETITIONERS,

VERSUS

ALABAMA BY-PRODUCTS COMPANY, ET AL,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF KOPPERS COMPANY, INC., RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court is reported in 328 F.Supp. 1140. The opinion of the United States Court of Appeals for the Fifth Circuit is not as yet published but is Appendix III to petitioners' Petition for Certiorari on pages A-5-A-6.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does a Federal District Court have jurisdiction of an action brought for damages and injunctive re-

lief by riparian landowners along a navigable waterway, who use the land for commercial and recreational purposes, caused by the discharge of industrial waste in a tributary of such waterway which renders the waterway harmful and offensive to fish, wildlife, livestock and human beings and thereby impairs the use, value and enjoyment of their land, against industrial plants discharging such waste without a permit from the United States Corps of Engineers?

2. Does the Rivers and Harbors Act of 1899 (28 U.S.C., Sec. 407) imply a private right of action for riparian landowners for damage caused by the discharge of industrial waste in a tributary of a navigable stream flowing past their lands, which are unrelated to navigation or anchorage?

STATEMENT

Some sixty-five persons originally filed this suit in the District Court for the Northern District of Alabama against nineteen defendants. The complaint was later amended and increased the number of plaintiffs and defendants. Each of the defendants operate manufacturing plants on tributaries of the Warrior River, a navigable stream in Alabama.

Plaintiffs, riparian landowners, claim that by discharging industrial waste in said tributaries, defendants are polluting the navigable stream to such an extent that plaintiffs' recreational and commercial use of their land has become less valuable, in that waters of the river have become harmful and offensive to fish, wildlife, livestock and humans. They claim that the discharges are made in violation of the Rivers and Harbors Act of 1899, in that the defendants do not

possess a permit to discharge from the United States Corps of Engineers.

Plaintiffs attempted to establish jurisdiction in several ways, such as: diversity of citizenship, violation of the Civil Rights Act, violation of the Fifth and Fourteenth Amendments to the United States Constitution, and that the action arose under the Constitution, laws and treaties of the United States (28 U.S.C., Sec. 1331).

In their brief the petitioners have abandoned all arguments except that this Court has jurisdiction under the provisions of 28 U.S.C., Sec. 1331, in that the respondents have violated the Rivers and Harbors Act of 1899, Title 28, U.S.C., Sec. 407.

The District Court held that the facts alleged failed to show that there was an obstruction to navigation involved and that Title 28, U.S.C., Sec. 407, does not imply a private right of action for riparian landowners for the pollution of a navigable stream flowing past their properties, but that their remedy was through state common law actions. *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140.

The United States Court of Appeals for the Fifth Circuit affirmed on the basis of the District court's opinion.

The petitioners have petitioned this Court for certiorari.

STATUTES INVOLVED

1. Petitioners have set out verbatim in their brief at page 3 thereof, Section 407 of Title 33, U.S.C.,

the Rivers and Harbors Act of 1899, one of the statutes involved.

2. Title 28, U.S.C., Sec. 1331,(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

ARGUMENT

The petitioners seek review by this Court on the following several grounds: That there is an important question of federal law involved, that the Fifth Circuit's holding is contrary to numerous holdings of this Court and the Fifth Circuit's holding is in conflict with similar holdings of other Federal Courts of Appeal.

It is within the sound discretion of this Court to determine whether or not the question of federal law is of such importance as to require a review of this case. Respondent doubts that this case is of such importance, since two lower courts have resolved the questions involved in such a well-reasoned manner that there leaves no doubt as to the answer to questions raised.

There appears to be no conflict with *U. S. v. Standard Oil Co.*, 384 U.S. 224, 86 S.Ct. 1427, 16 L.ed.2d 492 (1966). This case held that the discharge of 100 octane gasoline in a navigable stream violated the Rivers and Harbors Act of 1899, 33 U.S.C., Sec. 407, in that such discharge was refuse. Such a discharge

was definitely a hazard to navigation and the proceeding was brought by the United States for violation of this penal statute, as is authorized by Title 33, Sec. 413, U.S.C.

Gully v. First National Bank, 299 U.S. 109, 81 L.ed. 70, 57 S.Ct. 96 (1936), presents no conflict with the lower court's opinion, but substantiates the conclusion that the facts alleged do not require the interpretation of the federal statute (Rivers and Harbors Act of 1899) and that complete relief can be given under the State statutes. That federal jurisdiction merely lurks in the background.

Tunstall v. Brotherhood of Locomotive Firemen and Engineers, 323 U.S. 210 (1944); and *Steele v. L & N Railroad Company,* 323 U.S. 192 (1944), being similar cases, held that the Railway Labor Act imposes upon a labor union acting under it, the duty to act fairly toward members of the labor union without respect to race and, when it did not, it violated the constitutional rights of the plaintiff, a member of the union. We see no analogy to the case here.

Texas Pacific Railway Co. v. Rigsby, 241 U.S. 33, 36 S.Ct. 482, 60 L.ed. 874 (1915), substantiates further the reasoning of the lower court in the instant case. There the injured party, suing under the Federal Safety Appliance Act, was one for whom the Act was enacted to protect, an employee of the railroad, and, therefore, there arose an implied action for recovery for his injuries. The Rivers and Harbors Act of 1899 was not passed to protect riparian owners from polluted water, but for the benefit of the United States to protect navigation.

Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.ed. 939 (1946), is inapplicable to substantiate petitioners' contentions being a case where the court implied a remedy for recovery of damages where constitutional rights had been violated, and not to enforce a federal penal statute enacted for the protection of others than this applicant.

Sierra Club v. Morton, 31 L.ed.2d 636 (1972), had to do with standing to sue, which is no issue here. There such standing was denied because the plaintiff could show no palpable economic injury.

Wyandotte Transportation Co. v. U. S., 389 U.S. 191, 88 S.Ct. 379, 19 L.ed.2d 407 (1967), lends no assistance to the petitioners. In this case a sunken vessel was a most dangerous obstruction to navigation. It seems to confirm the holding in the instant case.

In *J. I. Case v. Borak*, 377 U.S. 426 (1964), the statute involved provided for suits in equity and at law to enforce liability for violation of that act. There was no question of an implied remedy.

United States v. Ballard Oil Co., 196 F.2d 369 (1952); *La Merced*, 84 F.2d 444 (1936), and *U. S. v. Esso Standard Oil*, 375 F.2d 621 (1967), are cases where the government prosecuted because of oil spillage in navigable streams. Oil so spilled was held to be refuse and that such acts violated the Rivers and Harbors Act of 1899. It is seen by these cases that the government, for whose benefit the Act was passed, was the one to enforce the Act. It can hardly be doubted that oil floating on the surface of a navigable stream is a hazard to navigation and that it is refuse in the sense sought to be protected against by the Act.

The petitioners here are seeking to recover alleged damages to their real property occasioned by the pollution of the Warrior River which flows by their holdings. They claim injury to their recreational facilities built along said River. They also seek an injunction to prevent further discharge of industrial waste by respondents into a tributary of the River.

As is stated in the opinion of the District Court, 328F.Supp. 1140, at 1144, the relief prayed for by the petitioners does not depend exclusively upon a violation of Title 33, Sec. 407, U.S.C., since the state law of Alabama is geared to provide complete relief in damages and by injunction for the damage done to riparian landowners. *Williams v. Still*, 263 Ala. 214, 82 So.2d 230 (1955); *Elmore v. Ingalls*, 245 Ala. 481, 17 So.2d 674 (1944); *Sloss-Sheffield Steel & Iron Co. v. Morgan*, 181 Ala. 587, 61 So. 283 (1913); and *Montgomery Limestone Co. v. Bearden*, 256 Ala. 269, 54 So.2d 571 (1951).

In *Johnston v. Byrd*, 354 F.2d 982 (5th Cir. 1965), the Court stated:

> "State law determines that question, not federal law. A question of federal law is often 'lurking in the background' of every case. In order to invoke the jurisdiction of a federal court there must be 'a substantial claim founded "directly" upon federal law'."

Therefore, unless there is a real issue involving the construction of a federal statute or some federal law or the Constitution of the United States, no federal question jurisdiction is present. As the Court has stated in *Gully v. First National Bank*, supra:

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action (cases cited). The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another (cases cited). A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (cases cited), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."

and as further stated in this case:

> " 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.' "

And in *Marshall v. Desert Properties Co.*, 103 F.2d 551 (1939), where the Court quoted as follows:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is validity of an authority every time an act done by such authority is disputed."

See also *Gray v. Oklahoma Land and Cattle Company*, 240 F.Supp. 646 (1965), and *Chambers-Liberty*

Counties Navigation District v. Parker Brothers & Co., Inc., 263 F.Supp. 602 (1967).

Even though petitioners rely on a violation of the federal statute, 33 U.S.C., Sec. 407, this statute is silent as to granting relief to individuals. It is a penal statute to be enforced by the government and enacted to protect the navigable waterways of this nation. Petitioners say that a private right of action is implied, there being a violation of a penal statute.

The violation of a penal statute does not imply a remedy for all persons, but only for those for whom the statute was intended to protect. The law correctly stated is: Where a statute establishes a standard of conduct, a person injured by the breach of that standard, may recover damages for that breach even though the statute fails to provide a private right of action, *if he is within the class for whom protection was intended.* Or, as stated in Restatement of Law, Second, Torts, Section 286, page 27:

> "A statute, ordinance, or administrative regulation may, because of its title, preamble, detailed provisions, history or other reasons, be found to be intended for the protection of the interests of only a particular class of persons. If so, a violation of the provision will be held to be negligence toward persons who are included within the particular class, but not toward those who do not fall within it."

The case of *Fitzgerald v. Pan American Airways*, 229 F.2d 499 (1956) also substantiates this statement. Although cited by petitioners to substantiate that a private civil action is implied for everyone for the

violation of a criminal statute, the opening statement of the Court in commenting on a violation of Section 484(b) of the Civil Aeronautics Act, 49 U.S.C., Secs. 401, et seq., the statute involved in that case, indicates definitely that the statute was enacted for the benefit of the class of persons to which the plaintiffs belonged:

> "The latter section is for the benefit of persons, including passengers using the facilities of air carriers. Consequently, by implication, its violation creates an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation. As we said in Reitmaster v Reitmaster, 2 Cir., 162 F.2d 691, 694: 'Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.' "

The legislative history of the Rivers and Harbors Act of 1899 is convincing of the fact that such an action as was brought by these petitioners, was not contemplated thereby, but that the Act was promulgated to protect navigation on the waterways of the United States, the principal beneficiary being the United States Government. In *Wyandotte Transportation Co. v. U. S.*, supra, the Court said:

> "Article 1, § 8 of the Constitution grants to Congress the power to regulate commerce. For the exercise of this power the navigable waters

> of the United States are to be deemed the 'public property of the nation and subject to all the requisite legislation by Congress.' . . . the federal government is charged with insuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction . . . the Rivers and Harbors Act of 1899, an assertion of the soverign power of the United States . . . was obviously intended to prevent obstructions in the nation's waterways. Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad . . . and we have found that a principal beneficiary of the Act, if not the principle beneficiary, is the government itself."

A review of the history of the Act is set out in the District Court's opinion, Appendix III of petitioners' Petition for Writ of Certiorari, Pages A-16 through A-19, and 328 F.Supp. 1140 (1971) at pages 1146-1148. Respondent does not believe it can improve on the statements made and the conclusions drawn by the Court, and adopts such statements.

Respondent calls to this Court's attention, that no court during the history of this Act has determined that there exists under it a private right of action, except where such was bound up with rights growing out of obstruction to navigation or anchorage. Some of such cases are: *Neches Canal Co. v. Miller & Vider Lumber Co.*, 24 F.2d 763 (1928); *Acme Boat Rentals v. J. Ray McDermott Co.*, 424 F.2d 393 (1970); *Maier v. Publicker Commercial Alcohol Co.*, 62 F.Supp. 161 (1945); *Lauritzen v. Chesapeake Bay Bridge & Tunnel District*, 259 F.Supp. 633 (1966).

In the cases where damages were claimed and there was no obstruction to navigation or anchorage involved, the courts have consistently denied recovery. *H. Christiansen & Sons, Inc. v. City of Duluth*, 154 F.2d 205 (1946); *Chambers-Liberty Counties Navigation District v. Parker Brothers & Co.*, 263 F.Supp. 602 (1967).

In the latter case, the Court observed:

> "Both section 403 and section 407 are concerned with obstructions to navigation. As I read the petition, an essential element of the Navigation District's complaint does not involve an injury to or obstruction of navigation; nor is its claim of damages predicated upon such an occurrence. Such an allegation is an essential element of a cause of action arising under 33 U.S.C. § 403 or § 407. See United States v. Bigan, 170 F. Supp. 219 (W.D. Penn. 1959); City of Memphis v. Ingram, 98 F.Supp. 395 (E.D. Ark. 1951), rev'd on other grounds, 195 F.2d 338 (8th Cir. 1952); Gulf Atlantic Transportation Co. v. Becker County Sand & Gravel Co., 122 F.Supp. 13, 17 (E.D.N.C. 1954), and cases cited therein. Nor does the petition allege or imply that the relief sought or the right pursued involves a dispute or controversy respecting the validity, construction, or effect of either of these statutes; a requirement for federal-question removal."

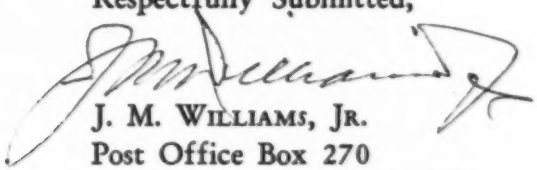
The District Court's conclusions, adopted by the Fifth Circuit, should be sustained, there being no obstruction or hindrance to navigation or anchorage involved, the statute not having been enacted to protect riparian landowners from polluted waters flowing by

their land, and for the further reason that there can be no remedy implied from this criminal statute, for the protection of the class of persons to which the petitioners belong.

CONCLUSION

The petition for certiorari should be denied.

Respectfully Submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1672

T. W. GUTHRIE, et al.,
Petitioners,

versus

ALABAMA BY-PRODUCTS COMPANY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

BRIEF

In Opposition on Behalf of Respondents, Alabama By-Products Corporation, McWane Cast Iron Pipe Company, Hayes International Corporation, Chicago Bridge & Iron Company, Woodward Corporation, Southern Natural Gas Company

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Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF

In Opposition on Behalf of Respondents, Alabama By-Products Corporation, McWane Cast Iron Pipe Company, Hayes International Corporation, Chicago Bridge & Iron Company, Woodward Corporation, Southern Natural Gas Company

Respondents, Alabama By-Products Corporation, McWane Cast Iron Pipe Company, Hayes International Corporation, Chicago Bridge & Iron Company, Woodward Corporation and Southern Natural Gas Company (hereinafter "Respondents"), oppose the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this cause. The per curiam opinion of the Court of Appeals is reported at 456 F.2d 1294

and included in petitioners' brief at pages A-5 and A-6. The Court of Appeals expressly affirmed the case on the basis of the district court's opinion, reported at 328 F. Supp. 1140 and contained in petitioners' brief at pages A-7 through A-21.

QUESTION PRESENTED FOR REVIEW

Respondents cannot agree with the statement in petitioners' brief of the questions presented for review. Respondents state that the single issue presented by this petition is whether the courts below correctly held in an action brought by riparian landowners for injuries to their property rights that 33 U.S.C. §407 does not create a federal right of action and present a basis for federal question jurisdiction.

STATEMENT OF THE CASE

Petitioners' brief misstates the holdings of the lower courts and attempts to broaden the questions presented to this Court. The district court's holding, and Court of Appeal's affirmance, of no federal question jurisdiction was based upon decision of the narrowly defined question and the limited issue of whether private riparian landowners had a federally created right of action under 33 U.S.C. §407 (section 13 of the Rivers and Harbors Appropriation Act of 1899) for property damage not related to anchorage or navigation. The district court's opinion explicitly states this limited holding:

> A careful review of the Rivers and Harbors Appropriation Act of 1899, its legislative history, its administrative interpretation and its judicial gloss has convinced this court that 33 U.S.C.A. § 407 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water pollution that have traditionally been dealt with under the law of nuisance.
>
> 328 F.Supp. at 1145;
> (A-13 Petitioners' Brief).

Petitioners' statement (p. 5 of Brief) that both lower courts have held that Section 13 applies only to discharge of refuse that interferes with navigation confuses the issue before this Court and misstates the district court's decision. In fact the district court held that:

> [A]lthough Section 407 may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even **from deposits in violation of Section 407**, does not give rise to a federal right of

action nor does it supply a basis of federal jurisdiction in this case (emphasis added).

328 F.Supp. at 1148;
(A-19 Petitioners' Brief).

The limited holding and scope of the decisions of the courts below is clear and petitioners' attempt to expand or confuse such decisions becomes apparent upon a careful reading of the opinions.

REASONS FOR REFUSING WRIT OF CERTIORARI

1. No Important Question of Federal Law

Petitioners argue that this case presents an important question of federal law by referring to the growing concern of the courts for environmental and ecological problems. The decision of the courts below does not evidence a lack of concern for these problems but merely recognizes that petitioners have a forum for their complaints—the state courts—which forum has traditionally dealt with the questions presented by petitioners' complaint. It is clear from a reading of the decision of the district court that it recognized the growing ecological concerns (see A-20 Petitioners' Brief) but likewise recognized that there existed no legitimate basis or need to expand the existing federal law to allow jurisdiction of petitioners' common law claims.

Moreover, there is absolutely no basis for petitioners' claim that the decisions below in any manner effect the Justice Department's use of the Refuse Act as a tool in its pollution abatement program.

This case does not unsettle any important federal law nor does it interfere with federal pollution activities.

2. **No Conflict With Applicable Decisions of This Court**

All of the cases cited and arguments made by petitioners regarding a conflict with decisions of this Court were presented to both of the courts below and rejected. The district court's opinion fully answers the arguments raised in this regard and respondents rely on the opinion and will not burden this Court with repetition of well recognized principles of federal jurisdiction and private implied civil action concepts.

3. **No Conflict With Decisions of Other Courts of Appeal**

The same comment made above applies to petitioners' arguments and authorities made in support of their theory that the decisions here are in conflict with those of other Courts of Appeal. It is interesting to note that petitioners, although arguing that the lower courts here have ignored the recent awareness of environmental problems, fail to cite **any** recent case of any other Court of Appeals dealing with environmental problems which they claim these decisions to be in conflict with.

ARGUMENT

Title 33 U.S.C. § 407 Does Not Create a Private Cause of Action for Injury Caused Riparian Landowners Not Related to Navigation

The legislative history and administrative interpretation of the 1899 Act clearly supports the lower courts' determination that no private right of action should be implied in the absence of an obstruction or impediment to navigation. This determination does not include the meaning which petitioners attempt to ascribe to it in their argument (Brief pp. 8-14) that the courts below read into the statutory prohibition a requirement that for a violation of § 407 to occur navigation must be injured. The district court's holding was that the intent of the statute was to protect navigation and this intent was important in determining what kind of civil remedy should be implied. Petitioners, in asking the courts below to imply a civil remedy, conceded that the remedy sought was not expressed in the statute but argued it should be implied. The district court examined the legislative history to determine the intent of the legislation and whether the petitioners were to be afforded implied civil relief under the penal statute involved. The legislative history was not examined to determine what the act prohibited but rather was looked to for determining the purpose of Congress in prohibiting the activity to ascertain whether Congress intended the kind of relief petitioners were seeking and whether the statute was to protect the rights they were seeking to enforce. Both lower courts determined after extensive briefing and oral arguments that petitioners were not within the class intended to be protected by the statute and the injuries complained of were not related to the interest sought to be protected.

The decisions below recognize a federally protected private right of action under § 407 for injuries to navigation or anchorage. The courts below also recognized that the penal provisions of § 407 could be enforced by the responsible government officials whether or not violations of that section interfered with navigation or anchorage. There is absolutely no basis for petitioners' arguments that the courts below have given § 407 a narrow and cramped reading or that the construction given this section conflicts with the enforcement procedures of the United States government.

In addition to the legislative history and administrative interpretation, a close examination of the statute itself and its judicial construction led the courts below to the conclusion that it does not provide petitioners with a federally protected right to seek recovery for damages caused by industrial discharges which have no effect on navigation.

The district court, while recognizing the implication of a civil remedy for violations of penal statutes as a sound principle of law, held that the two requisites for its invocation were not met in this case: (1) petitioners were not within the class of persons for whose special benefit the statute was enacted and (2) section 407 was not enacted for the purpose of protecting against the type of injury alleged by petitioners. **Wyandotte Transportation Co. v. United States**, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967); **H. Christiansen & Sons, Inc. v. City of Duluth**, 154 F.2d 205 (8th Cir. 1946); **Chambers-Liberty Counties Nav. Dist. v. Parker Bros. & Co.**, 263 F. Supp. 602 (S.D. Tex. 1967). The district court explicitly recognized that numerous judicial decisions have held that violation of the penal provisions of the 1899 Act with resulting injury to rights of navigation or anchorage can be a basis of a federal right of action. See, e.g., **Acme Boat Rentals, Inc.**

v. J. Ray McDermott & Co., 424 F.2d 393 (5th Cir. 1970) and cases cited in footnote 17 of district court's opinion (p. A-15 Petitioners' Brief).

Not only do petitioners fail to come within the general rule regarding implied civil actions, no court, of which respondents are aware, has implied a civil remedy under § 407 in favor of parties in a position similar to petitioners. The only other decision directly dealing with this issue is **Lavagnino v. Porto-Mix Concrete, Inc.**, 330 F. Supp. 323 (D. Colo. 1971), which held as did the lower courts here, that it did not have jurisdiction of a claim which dealt with property damage but did not involve damage to or effect on navigation. See also, **Hooper v. United States**, 331 F. Supp. 1056 (D. Conn. 1971).

All of the cases cited by petitioners relative to federal question jurisdiction—(pp. 20-25 Petitioners' Brief)—were cited to the courts below and respondents submit that the district court's opinion fully answers the petitioners' argument in this regard. Petitioners' cause of action in no way depends on the existence or construction of § 407. Reliance on federal law sufficient for federal jurisdiction must be direct and not remote. **Bell v. Hood**, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); **Gully v. First National Bank**, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); **Johnston v. Byrd**, 354 F.2d 982 (5th Cir. 1965). In this case the petitioners' claim is founded not upon federal law but upon common law torts of negligence and nuisance. Section 407 is irrelevant and wholly tangential to petitioners' claims thus there is no claim founded directly upon federal law. At most the statute may establish a standard of care by which to evaluate the activities of respondents but the validity of the statute or its construction is not involved. Section 407 is not an element, especially not an essential one, of petitioners' cause of action.

CONCLUSION

Respondents submit that the petition for a writ of certiorari should be denied. None of the basic reasons for granting such a writ are involved herein—no important question of federal law is involved andl no conflict exists between this decision and the decisions of other Courts of Appeal or this Court.

All of the arguments and authorities presented by petitioners here were presented and carefullly analyzed by the courts below. The district court and the Court of Appeals for the Fifth Circuit concluded that no basis exists for implying a civil remedy under the circumstances of this case and no need exists to expand the present federal law to allow jurisdiction of these commom law claims. Although the federal judiciary has, in the main, expanded concepts and liberally construed federal statutes when compelled to do so by a pressing and legitimate need such a case is not presented here. These petitioners have not, in seeking redress of some legitimate injury turned to the federal courts as a last resort, after being denied relief elsewhere, but have attempted to open the federal door

first, with full realization that a state forum is available which will recognize the common law rights involved.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1672

T. W. GUTHRIE, et al.,
Petitioners,

versus

ALABAMA BY-PRODUCTS COMPANY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

BRIEF

In Opposition on Behalf of Respondents, Bessemer Galvanizing Works, E. I. du Pont de Nemours and Company, Hercules Incorporated, Republic Steel Corporation, United States Steel Corporation

QUESTION PRESENTED

Whether a private civil action for damages to property, allegedly resulting from water pollution, against persons discharging refuse into navigable waters in violation of 33 U.S.C. §407 constitutes a controversy arising under the laws of the United States.

STATEMENT OF THE CASE

These Respondents deem it necessary to correct certain inaccuracies and omissions contained in the Petitioners' Statement of the Case.

The Petitioners aver injury or damage to their property rights as a result of alleged water pollution by all of the Respondents. All of the Petitioners are citizens of the State of Alabama. Some of the Respondents are citizens of the State of Alabama, but most are citizens of states other than Alabama.

The Petitioners based federal jurisdiction of their action upon 28 U.S.C. §1331(a), which provides for jurisdiction when the controversy "arises under the Constitution, laws or treaties of the United States," and specifically stated that the "laws" of the United States under which this controversy arose was 33 U.S.C. §407 (Section 13 of the Rivers and Harbors Act of 1899). The United States District Court for the Northern District of Alabama granted the Respondents' motions to dismiss the action on the ground that there was a lack of federal question jurisdiction because the controversy did not arise under the laws of the United States within the meaning of 28 U.S.C. §1331(a). In a per curiam opinion, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court.

ARGUMENT

This case involves nothing more than a traditional local cause of action by private individuals for damages to real property resulting from water pollution. Jurisdiction below was not urged on the basis of diversity of citizenship, but rather that the Petitioners' claim was one arising under the laws of the United States in that the claimed water pollution was also in violation of 33 U.S.C. § 407. The United States District Court held that it did not have jurisdiction over Petitioners' claim in that the claim was not so substantially or directly related to a violation of 33 U.S.C. §407 as to confer federal jurisdiction under 28 U.S.C. § 1331(a) as a controversy arising under the laws of the United States. An analysis of this case and the facts and law surrounding it, fails to reveal any good reason or valid basis for granting the petition for writ of certiorari.

I. There Is No Conflict of Decisions.

The decision of the Court of Appeals in this case is not in conflict with any decisions of the Supreme Court of the United States nor of any decisions of any Court of Appeals of other Circuits.

A. There is no conflict with decisions of the Supreme Court:

The decisions of this Court have established certain standards or tests for determining whether or not a case arises under the laws of the United States for the purposes of federal question jurisdiction. The decision in this case is clearly consistent with those decisions. In **Gully v. First National Bank in Meridian**, 299 U. S. 109 (1936), it was stated that the right or immunity created by the law of the United States "must be an element, and an essential one, of the plaintiff's cause of action". That case points

out that not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. Such is obviously true in the case at bar. This can be emphasized by paraphrasing a portion of the opinion in the **Gully** case, supra, at page 115:

> If there were no federal law prohibiting the discharge of refuse into navigable waters, a suit to recover damages for such would not be one arising under the laws of the United States. That there is a federal law prohibiting such discharge does not change the basis of the suit, though the federal law may be a measure of the standard of conduct.

The laws of the State of Alabama have long recognized claims such as presented by the Petitioners here. **Tutwiler CC & I Co. v. Nichols**, 146 Ala. 364, 39 So. 76 (1905); **Montgomery Limestone Co. v. Bearden**, 256 Ala. 269, 54 So.2d 571 (1951). The allegation that respondents are violating 33 U. S. C. § 407 adds nothing to Petitioners' basic claim. The claim of Petitioners does not directly and substantially involve a dispute or controversy respecting the validity, construction or effect of the Act upon the determination of which the result depends. **Shulthis v. McDougal**, 225 U.S. 561 (1912).

The other decisions of this Court, cited by Petitioners as being in conflict with the decision of the Court of Appeals for the Fifth Circuit, are plainly not applicable to the present situation, either in fact or principle. **Steele v. Louisville & N. R. Co.**, 323 U.S. 192 (1944), and **Tunstall v. Brotherhood of Locomotive Firemen & Enginemen**, 323 U.S. 210 (1944), were claims concerning racial discrimination by a labor union operating under the Railway Labor Act which directly and substantially involved the interpretation and effect to be given that Act, as well as the constitutional prohibitions against racial discrimination. Indeed, **Steele v. Louisville & N. R. Co.**, supra, did not involve federal question jurisdiction.

Petitioners also assert that the decision of the lower court is in conflict with the decisions by this Court in **Texas & Pacific Ry. Co. v. Rigsby**, 241 U.S. 33 (1915), and **Bell v. Hood**, 327 U.S. 678 (1946). While **Texas & Pacific Ry. Co. v. Rigsby**, supra, holds that a railroad employee has a right of action under the Federal Employers Liability Act for injuries resulting from a violation thereof, the situation presented by **Crane v. Cedar Rapids & I.C.R. Co.**, 395 U.S. 164 (1969), is more analogous to the Petitioners' situation. The **Crane** case, supra, holds that there is not an implied federal private right of action in favor of every person (there a non-railroad employee) as the result of a violation of a federal act (there the Safety Appliance Act).

In **Bell v. Hood**, 327 U.S. 678 (1946), the plaintiff's constitutional rights under the Fourth and Fifth Amendments had been violated by the defendants. Respondents have no quarrel with the general principle stated therein that federal question jurisdiction is present when the claim is founded substantially or directly upon a federal law or the Constitution; however, that case is otherwise inapplicable to the instant case.

These Respondents know of no decision of this Court which holds that private parties such as these Petitioners, alleging a traditional local cause of action for damages to property are entitled to invoke federal question jurisdiction. This case is not a "standing" case brought under the Administrative Procedure Act, 80 Stat. 392, 5 U.S.C. § 702, as was **Sierra Club v. Morton**, ... U.S. ..., 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972); nor is it a proceeding brought by the United States, the party charged with enforcement of the Act and the principal beneficiary thereunder, to protect its interests in preventing obstructions to the nation's waterways as in **Wyandotte Transportation Co. v. United States**, 389 U.S. 191 (1967). The

provisions of 33 U.S.C. § 407 set forth the prohibitions against deposit of refuse in navigable waters without a permit from the Corps of Engineers. Specific and limited penalties for violations of Section 407 are provided for in 33 U.S.C. § 411. The affirmative duty of enforcing Section 407 is specifically placed on the Department of Justice by 33 U.S.C. § 413.

J. I. Case Company v. Borak, 377 U. S. 426 (1964), cited by Petitioners is inapposite to this case. There the statute specifically granted to "the appropriate District Courts jurisdiction over 'all suits in equity and actions at law brought to enforce any liability or duty created' under the Act." 377 U.S. 430-431. There is no similar provision in 33 U.S.C. Sections 407, 411 or 413, or other related sections, from which a private right of action may be implied.

The Petitioners have failed to demonstrate any basis for their assertion that they are within the special class of persons sought to be protected by 33 U.S.C. § 407 so as to entitle them to have a private right of action implied in their favor. Petitioners' assertion to this effect is wholly unsupported by the facts of the case and the decisions of this Court.

Petitioners also contend that this decision is in conflict with the decision of this Court in **United States v. Standard Oil Co.**, 384 U.S. 224 (1966), in that the Fifth Circuit interpolates an "impediment to navigation" test into the provisions of 33 U.S.C. §407. There are two fallacies with Petitioners' argument. The basic fallacy is that **United States v. Standard Oil Co.**, supra, did not concern itself with this peripheral matter. The only question presented for review to this Court in that case was whether or not commercially valuable aviation gasoline was within the meaning of "any refuse matter". Also, that case did not involve litigation between private

parties, but was a criminal proceeding instituted by the Government. The decision in the instant case held that there was a lack of federal question jurisdiction, in a suit by private riparian landowners for the traditional tort actions of water pollution.

There can be no doubt that the decision below is in accord with the decisions of this Court. **Gully v. First National Bank In Meridian**, 299 U.S. 109 (1936); **Shultis v. McDougal**, 225 U.S. 561 (1912). The decision below is neither in conflict with any decision of this Court nor with any principles or reasoning contained in such decisions.

B. There is no conflict with decisions of other Courts of Appeals:

There is no decision in any other circuit which holds that a suit by private citizens alleging injury to their property, resulting from a violation of 33 U.S.C. § 407, provides a basis for federal jurisdiction as an action arising under the laws of the United States. The only decision involving an attempt by private parties, similar to Petitioners, to bring a civil action positing federal jurisdiction on a violation of 33 U.S.C. § 407, is **Lavagnino v. Porto-Mix Concrete, Inc.**, 330 F.Supp. 323 (D.Col., 1971). The Colorado District Court reached the same result as the District Court for the Northern District of Alabama and the Fifth Circuit in this case.

Petitioners urge as a reason for granting a writ of certiorari that the decision of the Fifth Circuit is in conflict with the decisions of the 2d Circuit in **United States v. Ballard Oil Co.**, 195 F. 2d 369 (1952); the 3rd Circuit in **United States v. Esso Standard Oil**, 375 F. 2d 621 (1967), and the 9th Circuit in **La Merced**, 84 F. 2d 444 (1936). The cases cited by Petitioners are all criminal prosecutions by the United States Government to enforce the provisions

of 33 U.S.C. § 407, et seq. Additionally, they did not involve any issue remotely akin to the case at bar. In **United States v. Ballard**, supra, the Court stated the issue involved in that appeal as follows:

> "The only question involved in this appeal is whether the escape of oil from the defendant's tank, . . . constituted a violation of § 407 of Title 33 USCA." Pg. 370

The issue on appeal in **United States v. Esso Standard Oil**, supra, was whether or not the provisions of the Rivers and Harbors Act were broad enough to cover "indirect deposits of refuse into navigable waters".

La Merced, supra, was a libel of information brought by the United States Government against the oil screw La Merced for the penalties provided by the Rivers and Harbors Act for oil pollution of Lake Union at Seattle, Washington. There the Court stated:

> "The sole issue is whether the phrase 'any refuse matter of any kind or description whatever' includes 'oil' within its meaning." Pg. 445

The decisions of the Courts of Appeals of other circuits cited by Petitioners are patently distinguishable from the decision below of the Fifth Circuit as involving not only Government enforcement of 33 U.S.C. § 407, but also different questions of law. The decision of the Fifth Circuit is not in conflict with decisions of any other federal circuit.

II. There Is No Important Question of Federal Law.

Although the public and the federal and state governments have shown a growing concern over water pollution and other environmental conditions, no amount of strained reasoning can convert the very narrow issue in this case into one involving an important question of federal law. By Petitioners' own admission, the Department of Justice of the United States has been, and still is, engrossed in a concerted drive, by way of criminal prosecutions to clean up the nation's waterways. The petition for a writ of certiorari and the accompanying argument are replete with citations of cases brought by the Government as the enforcer of the provisions of 33 U.S.C. § 407. The decision of the Fifth Circuit is limited in its application and presents no impediment to nor places any restrictions on the Government's role as enforcer of 33 U.S.C. § 407.

The substantive rights of private litigants have not been affected by the Fifth Circuit's decision. The decision does not deprive Petitioners, or others similarly situated, of a complete and adequate remedy. Unquestionably, their claim may be presented in the appropriate state court. Indeed, federal jurisdiction could have been invoked in this case on the grounds of diversity of citizenship by naming as defendants only those industries with citizenship diverse from Petitioners. The public concern over environmental quality, in and of itself, does not justify review of the per curiam opinion of the Fifth Circuit that no federal question jurisdiction exists over traditional private tort claims under state law, any more than public concern over the rising costs of automobile insurance, in and of itself, elevates an automobile accident case to one worthy of consideration by this Court. Broad generalizations and remotely possible analogies unrelated to the present factual situation do not and should not persuade this Court that this case presents a question of federal law of such vital importance as to warrant review.

III. The Decision Below Is Clearly Correct.

Although it may not be the province of this brief to defend the correctness of the decision in this case, these Respondents feel compelled to make clear that the decision was correct. As pointed out under Division I of the Argument, when applying the tests and standards of federal question jurisdiction as established by this Court in **Gully v. First National Bank in Meridian**, 299 U.S. 109 (1936), and **Shultis v. McDougal**, 225 U.S. 561 (1912), it is abundantly clear that the present claim by Petitioners fails to meet the requisite test for federal question jurisdiction. Petitioners' claim is nothing more and nothing less than a traditional local cause of action which does not substantially and directly involve a federal statute. To hold otherwise would be to open the doors of the federal courts to all manner and kind of litigation where a question of federal law is merely "lurking in the background." **Johnston v. Byrd**, 354 F. 2d 982 (5th Cir., 1965).

The opinion of the District Court was rendered only after submission of briefs and oral argument by the parties and after careful and deliberate consideration of the issues by the Court. The Court of Appeals for the Fifth Circuit found the decision of the District Court to be correct and apparently felt that the opinion was so well reasoned that it was not necessary for the Fifth Circuit to write an opinion of its own. The cases cited in the opinion of the District Court clearly support its decision. Other than by reference to the opinion of the District Court, we see no reason to burden this Court with the further citation of those authorities. Under the circumstances of the present case, the decision of the District Court was manifestly correct. In fact, the Court could have reached no other result. There being no conflict of decisions, nor any important question of federal law, there is nothing requiring review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

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Supreme Court, U. S.
FILED
JUL 24 1972
[illegible] JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1672

T. W. GUTHRIE, et al.,
Petitioners,
versus
ALABAMA BY-PRODUCTS COMPANY, et al.,
Respondents.

BRIEF

In Opposition to Petition for Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1672

T. W. GUTHRIE, et al.,
Petitioners,

versus

ALABAMA BY-PRODUCTS COMPANY, et al.,
Respondents.

BRIEF

In Opposition to Petition for Certiorari

Petitioners have failed to show any substantial reason for further review in this Court of the decision below.

Respondents will show that petitioners have (1) misinterpreted the basis of the holding below and (2) that the claimed conflicts between the decision below and other decisions do not exist.

PETITIONERS MISINTERPRET THE BASIS OF THE HOLDING BELOW

At the core of all of petitioners' arguments for a writ is the completely erroneous assertion that

> Both lower courts have thus held that Section 13 of the Refuse Act applies only to discharge of refuse that interferes with navigation and not to discharge that merely pollutes.
>
> (Petition, p. 5.)

This is **not** what the lower Courts held. To the contrary, both of the decisions* below assumed that the conduct complained of constituted violations of Section 13 of the Refuse Act (Appdx. to Petition, p. A-11).

The holding below is much narrower than petitioners assert. Without in any way denying the liability of respondents for criminal prosecution or for such equitable relief as may be sought by the **federal government**, the Courts below held that there is no **implied** right of action under the Refuse Act of 1899 in favor of **private citizens** to redress injury to their riparian **lands** resulting from water pollution in violation of that Act. This holding is summarized in the following excerpts from the opinion below:

> A careful review of the Rivers and Harbors Appropriation Act of 1899, its legislative history, its administrative interpretation and its judicial gloss has convinced this court that 33 U.S.C.A. §407 was not enacted for the purpose or with the effect of creating a federal cause of action to protect **riparian landowners** from the kinds of water pollution that

---

* The Court of Appeals adopted the opinion of the District Court (Appdx. to Petition, pp. A-5-6).

have traditionally been dealt with under the law of nuisance. (Emphasis added.)

(Appdx. to Petition, p. A-13.)

All of this leads the Court to conclude that although Section 407 may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other **private** rights, **even from deposits in violation of Section 407,** does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction in this case. (Emphasis added.)

(Appdx. to Petition, p. A-19.)

Thus, it is apparent that the Courts below did not even suggest that Section 13 of the Refuse Act applies only to discharges of refuse that interfere with navigation. Petitioner's assertion that the Courts below held to this effect is a serious misinterpretation of the decision this Court is being asked to review.

CLAIMED CONFLICTS WITH OTHER DECISIONS DO NOT EXIST

The holding of the Courts below is entirely consistent with the proposition that **any** deposit or discharge of refuse directly into navigable waters, or tributaries of navigable waters, is a violation of Section 13 of the Refuse Act of 1899, for which the **federal government** may prosecute the offender in a criminal action or seek appropriate civil relief. As we have pointed out, the Courts below assumed that such discharges did constitute violations of the Act (Appdx. to Petition, p. A-11) and expressly recognized the United States as the principal beneficiary for which the statute was enacted (Appdx. to Petition, p. A-14). As such, the United States is entitled to press for criminal sanctions as well as civil relief on account of such discharges.

Thus, it is clear that there is no conflict with decisions of this Court under the Refuse Act of 1899 such as **U. S. v. Standard Oil Co.**, 384 U.S. 224, and **Wyandotte Transp. Co. v. U. S.**, 389 U.S. 191, because both of these were actions by the United States, one a criminal prosecution and one for civil relief. For the same reason, there is no conflict with circuit court decisions under the Refuse Act of 1899, such as **U. S. v. Ballard Oil Co.**, 195 F.2d 369 (CA2); **U. S. v. Esso Standard Oil Co.**, 375 F.2d 621 (CA3), and **La Merced**, 84 F.2d 444 (CA9), because all of these were criminal prosecutions instituted by the United States.

None of the other decisions of this Court which petitioners suggest (Petition, pp. 6-7) are in conflict with the holding below even involve the Refuse Act of 1899. Thus, it is obvious that those decisions could not present any substantial conflict with the holding below.

All the other cases of which we are aware in which **private citizens** have sought to establish federal question

jurisdiction under the Refuse Act of 1899 to redress injury to **property rights** caused by water pollution have been decided the same way this case was decided by the Courts below. **H. Christiansen & Sons v. City of Duluth,** 154 F.2d 205 (8th Cir. 1946) (action for damage to plaintiff's dock caused by timbers washed into navigable waters from defendant's dock); **Chambers-Liberty Counties Nav. Dist. v. Parker Bros. & Co.,** 263 F. Supp. 602 (S.D. Tex. 1967) (action for trespass and conversion of shells removed from a jetty owned by plaintiff); **Lavagino v. Porto-Mix Concrete Inc.,** 330 F. Supp. 323 (D.C. Colo. 1971) (action by riparian land owners not claiming injury to any rights of navigation). In addition, **Hawkinson v. Blandin Paper Co.** (D.C. Minn., April 14, 1972, 4 ERC 1009), which was an action by riparian land owners for injury to rights of navigation and anchorage, distinguished the cases cited above where no such relief was sought.

CONCLUSION

The holding below is grounded upon a thorough analysis of the Act, its legislative history and its subsequent administrative and judicial interpretation, which led both the Courts below to the conclusion that riparian land owners, complaining only of injuries to their right to use and enjoy riparian lands, are not within the class of persons for whose benefit the Refuse Act of 1899 was enacted (Appdx. to Petition, p. A-13-19).

Petitioners acknowledge that they must show themselves to be within the class of persons for whose benefit the Refuse Act of 1899 was enacted in order to have the benefit of any such implied right of action (Petition, pp. 15-17). However, in their effort to show that they are within this class, petitioners cite only decisions which have recognized an implied right of action under the Refuse Act of 1899 in favor of private parties complaining of injuries to their **rights of navigation** (Petition, pp.

18-20). Petitioners in this case do not complain of such injuries (Petition, p. A-5).

All the cases cited by petitioners on this point were recognized by the Courts below and the holding below was harmonized with them (Cf. Petition, pp. 18-20 and Appdx. to Petition, p. A-15).

The lower federal courts that have confronted cases with essential facts similar to this one have reached the same conclusion—that there is no "federal question" jurisdiction in such cases. Consequently, the body of case law that is being developed in the lower federal courts has not heretofore been inconsistent and it is not rendered inconsistent by the decision in this case below.

Thus, the petition fails entirely to show any reason why further review in this Court of the harmonious decisions of the two Courts below would be justified.

Respectfully submitted

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OPINIONS BELOW

The opinion of the District Court is reported in 328 F. Supp. 1140. The opinion of the United States Court of Appeals for the Fifth Circuit (not yet published) is Appendix III to petitioners' Petition for Certiorari on pages A-5 - A-6.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

Does a violation of the Rivers and Harbors Act of 1899 (28 U.S. C. Sec. 407) give rise to a civil action by riparian land owners along a navigable waterway?

STATEMENT

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix III (p. A-7) and the Court of Appeals for the Fifth District (Petitioner's Appendix II, p. A-5).

IN THE

SUPREME COURT OF THE UNITED STATES

T. W. GUTHRIE, ET AL

Petitioners

versus

ALABAMA BY-PRODUCTS COMPANY, ET AL

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF OF RESPONDENT, PEABODY COAL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REPLY TO PETITION FOR WRIT OF CERTIORARI

I. NO FEDERAL QUESTION IS PRESENTED.

The Petitioners attempt to make an alleged violation of Section 13 of the Refuse Act, 33 U.S.C.A., Section 407, the basis of Federal jurisdiction but have completely misinterpreted the opinion written by the Honorable Sey-

bourn H. Lynne. (Appdx to Petition, p. a-7) This opinion was adopted by the Fifth Circuit Court of Appeals (Appdx. to Petition, p. a-5, a-6)

The Petitioners contend on Page 5 of their Petition that Judge Seybourn H. Lynne of the United States District Court held that Section 13 of the Refuse Act applies only to discharge of refuse that interferes with navigation and not the discharge that merely pollutes.

The Petitioners make the erroneous statement on Page 5 of the Petition that:

> Both lower courts thus have held that Section 13 of the Refuse Act applies only to discharge of refuse that interferes with navigation and not the discharge that merely pollutes."

Even from a casual reading of Judge Lynne's opinion, it is obvious that Judge Lynne assumed for the purpose of his opinion that the various representatives had violated Section 13 of the Refuse Act. On Page a-11 of the Appendix to Petition, the Honorable Seybourn H. Lynne makes the following statement:

> "Assuming, arguendo, that the amended complaint charges violations of 33 U.S.C.A. Section 407, it does not follow that plaintiffs' claim of injuries resulting from conduct which violates 33 U.S.C.A. Section 407 'arises under' that statute in a sense that confers federal court jurisdiction of this action under 28 U.S.C.A. Section 1331."

Judge Seybourn H. Lynne then went on to hold that there was no implied right of action in favor of a private citizen or citizens under Section 13 of the Rivers and Harbors Appropriation Act of 1899 to redress injury to riparian lands resulting from violations of the Act. The holding is best expressed in the following excerpts from the opinion below:

"A careful review of the Rivers and Harbors Appropriation Act of 1899, its legislative history, its administrative interpretation and its judicial gloss has convinced this court that 33 U.S.C.A. Section 407 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water pollution that have traditionally been dealth with under the law of nuisance." (Appdx. to Petition, p. a-13)

"All of this leads the Court to conclude that although Section 407 may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even from deposits in violation of Section 407, does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction in this case." (Appdx. to Petition, p. a-19)

The holding below is grounded upon a thorough analysis of the Act, its legislative history and its subsequent administrative and judicial interpretation. These questions lead the courts below to the conclusion that riparian landowners, complaining only of injuries to their right to use and enjoy riparian lands, are not within the class of persons for whose benefit the Refuse Act of 1899 was enacted. (Appdx. to Petition, p. a-13-19)

Judge Lynne drew a very appropriate analogy between 33 U.S.C.A. Section 407 and the Safety Appliance Acts. (45 U.S.C.A. Section 1, et seq. Appdx. to Petition, p. a-19-20)

In this connection Petitioners acknowledge that they must show themselves to be within the class of persons for whose benefit the Refuse Act of 1899 was enacted in order to have the benefit of any such implied right of action. (Petition, p. 15-17) However, in their effort to show that they are within this class, Petitioners cite only decisions which have required an implied right of action under the Refuse Act of 1899 in favor of private parties complaining

of injuries to their *rights of navigation.* (Petition, 18-20) *Petitioners in the case at bar do not complain of such injuries.* (Petition, p. 5)

II. THERE IS NO CONFLICT WITH THE DECISIONS OF THE COURT.

The Petitioners cite the case of *United States versus Standard Oil Company,* 384 U.S. 224 as being in conflict with the case at bar. This case involved the *criminal* prosecution of the Standard Oil Company under Section 13 for allowing gasoline to be discharged into the St. John's River. In that case the Honorable Justice Douglas made the following statement:

> "But the relevant inquiry is not the admittedly important concerns of pollution control, but Congress' purpose in enacting this anti-obstruction Act, and that appears quite plainly to be a desire to halt through the imposition of criminal penalities the depositing of obstructing refuse matter in rivers and harbors."

The Court in no sense held that Section 13 of the Refuse Act would give rise to a civil cause of action of riparian owners.

The Petitioners also cite the case of *Gully vs. 1st National Bank,* 229 U.S. 109 as being in conflict with the case at bar. This case involved a suit against a bank to recover state tax and has no application to the case at bar, although the learned Justice Cardozo did discuss the question of when a claim "arises under" the laws of the United States. The Honorable Seybourn Lynne in the decision below also discussed this question pointing out that something more than mere reference to a federal statute is required and quoted from Justice Cardozo's opinion in *Gully v. 1st National Bank.* (Appdx. to Petition, p. a-11-12)

The Petitioners also cite the case of *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen.* This case

was a suit against a railway company and union for declaratory judgment that the union must represent all members of the craft without discrimination. An effort was made in that case to bring the action in the Federal courts under the Railway Labor Act, 45 U.S.C.A. Section 151, et seq. In holding that the Federal Courts did not have jurisdiction, the Court stated that federal jurisdiction could only be sustained where express provisions of the Act relied on indicate such jurisdiction. The case has no application to the case at bar.

The case of *Steele v. L & N Railroad Company* is also quoted by the Petitioners. This case is reported in 323 U.S. 192. This was an appeal from the Supreme Court of Alabama and was an effort on the part of the Brotherhood of Locomotive Firemen and Enginemen for an injunction against the enforcement of an agreement between the two defendants as to seniority rights of locomotive firemen. It has no application to the question involved in the case at bar.

The case of *Texas & Pacific v. Rigsby*, 241 U.S. 33 is also relied on by the Petitioners. This case involved the application of the Safety Appliance Act and specifically held that the Act was designed for railway employees only and since it designated the group of person for whose special protection and benefit the legislation was enacted, civil liability would be implied. As stated above, Judge Seybourn Lynne drew an analogy between the Safety Appliance Act and Section 13 of the Rivers and Harbors Act and concluded that the Rivers and Harbors Act did not specify any particular class of persons or group of persons for special protection.

The case of *Bell v. Hood*, 327 U.S. 678 is cited by the Petitioners and here again, the Court specifically stated that reliance on federal law as a basis of federal jurisdiction must be direct and not remote and unnecessary.

In the case of *Sierra Club v. Morton,* 31 L.Ed 2d 636 quoted by the Petitioners, this court held that it did not have jurisdiction. This was a suit where a conservation club had sought to enjoin federal officials from granting approval of commercial exploitation of a national game refuge. The action was brought under Section 10 of the Administrative Procedures Act.[1] The case has no application to the case at bar insofar as being an authority for federal jurisdiction.

Petitioners cite the case of *Wyandotte Trans Co. vs. United States,* 389 U.S. 191, as being in conflict with the lower court holding. The *Wyandotte* case involved an action by the United States to recover costs incurred in recovering a wreck negligently sunken in a navigable channel. This court held that the Rivers and Harbors Act of 1899 was obviously intended to prevent obstructions in the nation's waterways. Since no obstruction of waterways is involved in the case at bar, the *Wyandotte* case would have no application.

The last case cited by the Petitioners is that of *J. I. Case Co. v. Borak,* 377 U.S. 426. This was a suit under the Securities Exchange Act of 1934. The subject matter of the suit is so far removed from the factual situation involved in the case at bar that it would be impossible to draw any reasonable analogy.

III. THERE IS NO CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

The holding of the Courts below is entirely consistent with the proposition that *any* deposit or discharge of refuse directly into navigable waters, or their tributaries, is a violation of Section 13 of the Refuse Act of 1899, for which the *Federal government* may prosecute the offender in a criminal action or seek appropriate civil relief. As we have pointed out, the Courts below assumed that such discharges

[1] 5 U.S. C. Sec. 701.

did constitute violations of the Act (Appdx. to Petition, p. a-11) and expressly recognized the United States as the principal beneficiary for which the statute was enacted. (Appdx. to Petition, p. a-14). As such, the United States is entitled to press for criminal sanctions as well as civil relief on account of such discharges.

Thus, it is clear that there is no conflict with decisions of this court under the Refuse Act of 1899 such as *U. S. vs. Standard Oil Co.,* 384 U.S. 224 and *Wyandotte Trans. Co. v. U.S.,* 389 U.S. 191, because both of these were actions by the United States, one a criminal prosecution and one for civil relief. For the same reason, there is no conflict with circuit court decisions under the Refuse Act of 1899, such as *U.S. vs. Ballard Oil Co.,* 195 F.2d 369 (CA2); *U.S. v. Esso Standard Oil Co.,* 375 F.2d 621 (CA3) and *La Merced,* 84 F.2d 444 (CA9), because all of these were criminal prosecutions instituted by the United States.

None of the other decisions of this Court which petitioners suggest are in conflict with the holding below (Petition, p. 6-7) even involve the Refuse Act of 1899. It is obvious that the holding below could not present any substantial conflict with those decisions of this Court.

The only other cases of which we are aware in which *private* citizens have sought to establish federal question jurisdiction under the Refuse Act of 1899 to redress injury to *property rights* caused by water pollution have been decided the same way this case was decided by the Courts below. *H. Christiansen & Sons vs. City of Duluth,* 154 F.2d 205 (8th Cir. 1946) (action for damage to plaintiff's dock caused by timbers washed into navigable waters from defendant's dock); *Chambers-Liberty Counties Nav. Dist. vs. Parker Bros. & Co.,* 263 F. Supp. 602 (S.D. Tex. 1967) (Action for trespass and conversion of shells removed from a jetty owned by plaintiff); *Lavagino v. Porto-Mix Concrete Inc.,* 330 F. Supp. 323 (D.C. Colo. 1971) (action by

riparian landowners not claiming injury to any rights of navigation). In addition, *Hawkinson vs. Blandin Paper Co.* (D.C. Minn., April 14, 1972, 4 ERC 1009), which was an action by riparian landowners for injury to rights of navigation and anchorage, distinguished the foregoing cases where no such relief was sought.

CONCLUSION

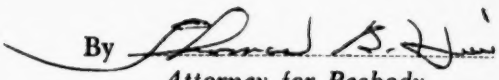
From the foregoing, it is abundantly clear that the "Important Question of Federal Law" suggested by petitioners is not at issue in this case.

The lower federal courts that have confronted cases with essential facts similar to this one have reached the same conclusion — that there is no "federal question" jurisdiction in such cases. Consequently, the body of case law being developed in the lower federal courts has not been inconsistent and certainly is not rendered so by the decision below.

Thus, the petition fails entirely to show any reason why further review in this Court of the harmonious decisions of the two Courts below would be justified.

Respectfully submitted,

HUIE, FERNAMBUCQ & STEWART

By 

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Respondent, Peabody Coal Company upon opposing counsel by placing a copy of same in the U. S. mail, postage prepaid on this 24th day of July, 1972.

Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, *et al.*,

Petitioners,

v.

ALABAMA BY-PRODUCTS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Environmental Defense Fund hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case.

The Environmental Defense Fund (EDF) is a non-profit, public-benefit corporation organized under

the laws of the State of New York. Its nationwide membership of 35,000 includes scientists, educators, lawyers, and other citizens dedicated to the protection of our environment and the wise use of the nation's natural resources. Among EDF's primary objectives is "to effect a joining of the best scientific findings with the most appropriate social action discovered by the social sciences and legal theory in order [to] * * * best promote a quality environment" [Bylaws, Art. 1:2(d)]. EDF's "social action" includes education, research, and—when necessary "to prevent * * * degradation"—legal action, which is designed in part "to provide scientists fair and impartial forums in which their scientific findings may be presented objectively to their fellow citizens" [*id.*, Art. 1:2(f)].

In accordance with its objectives, EDF through its Scientific and Legal Advisory Committees evaluates and defines environmental issues, collects research data relating to those issues, and determines whether litigation is the appropriate course to follow. Its national membership and professional resources thus enable EDF to focus public attention upon environmental incursions that might otherwise go unrecognized. Its prosecution of many major environmental lawsuits[1] has established it as

[1] See, e.g., *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (DDT pesticides); *Environmental Defense Fund, Inc. v. United States Dep't. of Health, Educ. & Welfare*, 428 F.2d 1083 (D.C. Cir. 1970) (DDT tolerance levels); *Environmental Defense Fund, Inc. v. Ruckleshaus*, 439 F.2d 584 (D.C. Cir. 1971) (DDT pesticides); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971) (Gillham Dam); *Environmental Defense Fund, Inc. v. Montrose Chemical Corp.*, C.D. Cal., Civil No. 70-2389-ALS (complaint filed October 22, 1970) (DDT discharge in coastal waters); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 324 F. Supp. 878

one of the nation's most effective and responsible litigants in this important field.

EDF has a vital interest in the outcome of this case. Water pollution has been an important element in many of its pesticide and water resource cases and in some of those cases EDF has alleged violations, *inter alia*, of the Refuse Act, 33 U.S.C. Sec. 407. The Fifth Circuit's holding that citizens have no private cause of action under the Refuse Act casts substantial doubt on the ability of EDF to rely on that Act in the future in litigation in the federal courts where it considers such litigation necessary to abate water pollution. EDF has an organizational commitment to promoting the abatement of water pollution.

If the petition were to be granted and if EDF were permitted to intervene as an *amicus curiae*, it would file a brief on the issues discussed in the attached brief.

EDF is filing this motion at this time because an examination of the recently enacted (October 18, 1972)

(D.D.C. 1971) (cross-Florida barge canal); *Environmental Defense Fund, Inc. v. Hardin*, 325 F. Supp. 1401 (D.D.C. 1971) (Mirex); *Wilderness Society, Inc. v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970) (trans-Alaska pipeline); *Environmental Defense Fund, Inc. v. Resor*, D.D.C., Civil No. 2394-70 (order filed August 14, 1970) (nerve gas); *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.*, 1 BNA Env. Rep. Cas. 1640 (D. Mont. 1970) (paper mill discharges); *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972), pending on appeal, 6th Cir., No. 72,138 (Tellico Dam); *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925 (D.D.C. 1971) (Tennessee-Tombigbee Waterway). EDF has also filed petitions and/or been heard as a party in proceedings before numerous federal agencies, including the Atomic Energy Commission, the Environmental Protection Agency, the Federal Aviation Administration, the Federal Power Commission, the Federal Trade Commission, and the National Forest Service.

Federal Water Pollution Control Act Amendments of 1972 discloses that not only did that Act not repeal the Refuse Act, but has made clear its continuing force and significance, and thus the importance of the present case.

Petitioners and the Solicitor General of the United States have consented to the filing of this brief.[2]

WHEREFORE, it is requested that leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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Attorney for
Environmental Defense Fund

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[2]We expect that the written consents will have been filed with the Clerk by the time this brief is filed. We are in communication with counsel for the several respondents and will inform the Court as promptly as possible of their positions on our motion.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, *et al.*,

Petitioners,

v.

ALABAMA BY-PRODUCTS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Each of the respondents operates an industrial or manufacturing plant which has discharged refuse directly into streams which flow into navigable waters. Respondents had never applied for or obtained any permit from

the United States for such discharges. These discharges do not appear to have resulted in any substantial interference with navigation, but, by polluting and rendering toxic the streams and waters, they have resulted in injury to the rights of lower riparian landowners.

Petitioners, all lower riparian landowners, brought suit in federal district court to recover compensatory and punitive damages and to obtain appropriate injunctive relief, alleging the existence of a statutory wrong derived from the Refuse Act, 33 U.S.C. Sec. 407. The District Court dismissed the complaint for want of federal question jurisdiction, concluding that the protection of the Refuse Act did not extend to riparian landowners faced with "the kinds of water pollution that have traditionally been dealt with under the law of nuisance" (Pet. A-13).

On appeal, the Fifth Circuit affirmed "on the basis of the district court's well-reasoned opinion" (Pet. A-6). In affirming, that court expressly framed the central issue as whether "defendants' conduct constituted an interference with navigation" (*id.*).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Refuse Act has continued to be–since *United States v. Standard Oil*, 384 U.S. 224 (1966)–the basic vehicle for protecting water quality. It must be acknowledged, however, that enforcement activity on the part of the government has been less than satisfactory. The House Committee on Government Operations recently reported:

> The E.P.A. compilation [for the period December 3, 1970, to February 29, 1972] states that the Justice

> Department initiated the following number of cases, with assistance by E.P.A. regional offices: 26 civil, and 23 criminal.
>
> These statistics hardly represent a "vigorous" enforcement program, in view of the thousands of industrial dischargers throughout the country * * * .
>
> –*Eighteenth Report of the Committee on Government Operations: Enforcement of the Refuse Act of 1899* (August 9, 1972), p. 9.

Clearly, full enforcement of water quality legislation is dependent on those citizens directly involved, and on the availability of the federal remedy to protect their interests in water quality. Cf. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967).[1]

The cricual role of citizen suits in enforcing environmental legislation has repeatedly been recognized by the Council on Environmental Quality, as in their 1972 report:

> Citizen enforcement of NEPA [National Environmental Policy Act of 1969, 42 U.S.C. Secs. 4321 *et seq.*] through court action has been one of the main forces in making the Act's intended reforms a reality. * * * The events of the past year indicate that citizens lawsuits continue to provide a check on agency compliance with NEPA and to resolve important questions about its interpretation.
>
> –*Environmental Quality: Third Annual Report* (August 1972), p. 248.

The central role of the private citizen action has been given further recognition in the 1972 Water Pollution Control Act Amendments, discussed *infra*.

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[1] On the inadequacy of government enforcement procedures, see also D. Zwick, "Water Pollution" in Rathlesberger, ed., *Nixon and the Environment* (New York: Village Voice Books, 1972).

Given the vagaries of bureaucratic structure, internal policy formulation and resource limitation (all present in full bloom in the *Armco* case under the Refuse Act, for example[2]), it is clear that the consistent and thorough enforcement of environmental standards can only be obtained through the threat of *private* action at law; as the experience with NEPA discloses, the citizen suit is the backbone of environmental quality, and it is imperative that the corresponding right in the area of water quality legislation be recognized.

I.

THE HOLDING BELOW IS BASED ON AN INTERPRETATION OF THE REFUSE ACT WHICH CONFLICTS WITH DECISIONS OF THIS COURT AND OF SEVERAL CIRCUITS.

It is certainly true that much of the language of the Rivers and Harbors Act is expressly limited to matters of navigation. Nonetheless, only the second of the two offenses specified by the Refuse Act proper is limited "whereby navigation shall or may be impeded." The more general force of the first prohibition was recognized by the Ninth Circuit in *United States v. Alaska Southern Packing Co. (La Merced)*, 84 F.2d 444 (9th Cir. 1936), the Second Circuit in *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952), and, most recently, by the

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[2]*See Eighteenth Report of the Committee on Government Operations: Enforcement of the Refuse Act of 1899* (August 9, 1972), pp. 45 ff. See also *U.S. v. Armco Steel*, 333 F. Supp. 1073 (S.D. Tex. 1971), as modified ___ F. Supp. ___ [3 ERC 1263].

Third Circuit in *United States v. Esso S.O. of Puerto Rico*, 375 F.2d 621 (3rd Cir. 1967).[3]

Since there is nothing in the legislative history of the Refuse Act—or in the conceptual armaments of statutory wrong—which would support applying the "interference with navigation" (Pet. A-6) limitation imposed by the lower courts in this case *solely to private parties*, the Fifth Circuit, in "the only reported decision construing Sec. 407 to the contrary,"[4] has cast a disproportionate shadow over federal enforcement activities.

That shadow has not been dissipated by recent passage of the 1972 Water Pollution Control Act Amendments. It is the express intent of Congress that *pending* federal actions not be affected by the new legislation.[5] There are still a number of federal water quality suits under consideration in the lower courts for which *Guthrie* serves as unfortunate precedent.

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[3]Indeed, Sec. 407's provision for a permit program for deposits which did *not* impede navigation would make little sense if the Act applied only to discharges which *did* impede it.

It should be noted that the facts in *H. Christianson and Sons v. City of Duluth*, 154 F.2d 205 (8th Cir., 1946), which is often cited as denying a private right of action unconnected with navigation, presented an issue under the *second*, modified, prohibition and not the "general" clause.

[4]*United States v. Pennsylvania Industrial Chemical Co.*, 329 F. Supp. 1118, 1122 (W.D. Pa. 1971), rev'd, ___ F.2d ___ (3rd Cir., May 30, 1972) [4 ERC 1241]. It appears that the dubious honor must be shared with *Chambers-Liberty Counties Nav. Dist. v. Parker Brothers*, 263 F. Supp. 602 (S.D. Texas 1967).

[5]See Section 4(a) of the bill for the "saving clause," which is interpreted by Sen. Muskie and Rep. Wright in Cong. Rec. Oct. 4, 1972 at pp. S16883 and H9124 respectively.

Certainly, too, the issue raised directly by this case, that of the existence of a private right of action to remedy pollution, is itself an important issue of federal law. Indeed, given the logic of derivative statutory rights and the holding of this Court in *Standard Oil*, acceptance of such a right seems overdue. In recent months the Second Circuit has expressly chosen to leave the issue raised here open.[6]

Of course, the violation of a federal statute does not entitle everyone injured thereby to bring suit; the injury asserted must be "of the type the statute was intended to forestall." *Wyandotte Transportation*, 389 U.S. at 202. This, we take it, was the meaning of the lower court's statement here that (Pet. A-19):

> the injury of other private rights [than navigation or anchorage], even from deposits in violation of Section 407, does not give rise to a federal right of action * * *.

Any other interpretation would be plainly inconsistent with this Court's extension of federal rights of actions to all those within the protected sphere of interest. *Texas and Pacific Railway v. Rigsby*, 241 U.S. 33 (1916); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Wyandotte Transportation, supra.*

Two recent cases, *Chambers-Liberty Nav. District v. Parker Bros.*, 263 F. Supp. 602 (S.D. Tex. 1967) and *Lavigmino v. Porto-Mix Concrete*, 330 F. Supp. 323 (D.

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[6] In *Connecticut Action Now v. Roberts Plating Co.*, 457 F.2d 81, 90, n. 16 (2d Cir. 1972), the Second Circuit expressly left open the question whether "a private claimant specifically injured by a violation of Sec. 407—a riparian owner for instance—can sue for an injunction or damages * * *." Cf. *Hawkinson v. Blandin Paper*, 54 F.R.D. 517 (D. Minn. 1972).

Colo. 1971) illustrate the distinction. While both cases may have involved violations of the Refuse Act, *neither* plaintiff appears to have been asserting interests tied either to anchorage and navigation or to water quality.[7] The injuries alleged were not "of the type the statute was intended to forestall."

The proper issue is therefore not whether, arguendo, a violation of the Refuse Act has occurred, but whether the injuries suffered thereby are tied to an interest protected by that Act. To reach its holding, then, the court below had to conclude that the attempt to control water pollution was *not* an interest at stake in the enactment of the Refuse Act.

A review of the legislative history on this point is hardly necessary, since this Court has already faced this problem of interpretation in *United States v. Standard Oil*, 384 U.S. 224 (1966), in which the Court recognized two distinct inerests at stake in the enactment of the 1899 Act: protection of navigation and anchorage *and* protection of water quality. The injury to be remedied by the Refuse Act, concluded Mr. Justice Douglas, "was caused in part by obstacles that impeded navigation and in part by pollution." 384 U.S. at 229.

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[7]The injuries were thus not of the groups defined in *U.S. v. Standard Oil, infra*, as protected. There was, then, no necessity for these courts to contemplate the implications of *Standard Oil* for private actions.

II.

PASSAGE OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 ACCENTUATES THE IMPORTANCE OF DERIVATIVE PRIVATE ACTIONS FOR VIOLATION OF INTERESTS PROTECTED BY THE REFUSE ACT.

A. The New Act Does Not Repeal the Refuse Act or Vitiate Its Force As Environmental Legislation

The Water Pollution Control Act Amendments of 1972 (hereinafter the 1972 Act) forms a comprehensive water quality statute which, *inter alia*, creates a permit program intended to operate in harness with the Refuse Act. Section 402(a) provides for an orderly transition from the present permit program handled by the Corps of Engineers to one supervised by a special administrator. The Secretary of the Army retains all his other authority under the Rivers and Harbors Act by virtue of Sec. 511(a). The continuing force of the Refuse Act is implicit in the language of Section 402(k):

> Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act. or (2) section 13 of the Act of March 3, 1899, unless * * * .

Thus, the new Act operates not to repeal the Refuse Act but to buttress it by creating an efficient and explicit permit program. This interpretation is supported by the remarks of Rep. Jim Wright, one of the conference managers of the bill:

> I cannot say that the Refuse Act has been a failure, but I can say that there are infirmities in the

program itself and infirmities created by the Kalur and PICCO decisions which have minimized the effectiveness of the Refuse Act.

The Committee on Public Works in the House of Representatives and the Committee on Public Works in the other body recognized the infirmities, existing and potential, and established a new permit program. [Cong. Rec. Oct. 4, 1972, p. H9128.]

As Senator Griffin put it on the same day in "the other body" (p. S16882):

* * * it is inconceivable that the Senate would want to emasculate the best available enforcement device now available (sic)—the Refuse Act.

Any argument that Congress intended to keep the Refuse Act solely as a navigational statute is inconsistent with Sec. 402(k), quoted *supra*, which implicitly recognizes that discharges which do not meet its exculpatory terms may constitute violations of the Refuse Act. On this point we also have the explicit statement of Rep. John Dingell, further barring such an argument:

* * * the bill does not repeal the Refuse Act of 1899. It still remains available to prevent the discharge of polluting wastes. (p. H9126)

B. The Purpose of Section 505 of the 1972 Act Was to Encourage Private Actions of All Kinds to Insure Enforcement of Water Quality Standards.

By the terms of Section 505(a), "any citizen" may bring an action against an alleged violator or against the Administrator to "enforce such an effluent standard or limitation" as defined in the Act, subject to various restrictions. In Section 505(e), however, Congress makes

it clear that the codification of this particular remedy is not meant to discourage or prohibit action on any other tack:

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statutue or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Thus the effect of Section 505 is threefold: it *recognizes* the crucial role of action by private citizens in enforcing water quality legislation; it *codifies* a particular approach to such citizen enforcement; it *leaves open* all other avenues to litigation aimed at compliance with the law.

C. Citizen Actions Under the Refuse Act Must Play a Key Role in Future Enforcement of Water Quality Standards.

Certainly one of the most important factors in the speedy development and application of water quality standards under the 1972 Act will be the rate at which permits are sought. As noted above, Sec. 402(k) of the new legislation provides that, until December 31, 1974, dischargers are immune from actions based on either the 1972 Act or the Refuse Act if their bona fide applications for permits are still under consideration. Conversely, it remains an offense under both Section 301(a) of the 1972 Act and under the Refuse Act to discharge effluents without applying for a permit—or to do so after a permit has been refused.

Section 505(f) of the 1972 Act provides further that no citizen action based on Sec. 505 can be commenced

for violation of Sec. 301(a) before July 1, 1973. Thus, until that time, *private* litigation based on the 1972 Act cannot be utilized by citizens who, adversely affected by illegal discharges, and wishing to insure that the 1972 Act will be fully complied with, look to the courts to pressure recalcitrant businesses into filing for permits. If, however, the discharge constitutes pollution within the meaning of *Standard Oil*, an injured citizen might bring suit under the Refuse Act at any time. The 1972 Act does not bar such a suit, an excellent policy decision since those whose discharges involve pollution have long been on notice that a permit is required. They should have no additional grace period under the Refuse Act of 1899.

Perhaps the most important facet of this entire issue is that while damage suits under the 1972 Act were not expressly authorized, in Section 505(e) Congress reserved whatever causes of action that might arise under any other statute—including, therefore, damage actions under the Refuse Act. While the threat of a civil fine may act as a deterrent of sorts in controlling water quality, it is an inefficient means of defining and distributing the social costs of pollution, particularly when compared to aggregated damage claims, such as in the present case. From such a perspective, the availability of damage actions for violation of water quality standards is an essential element in enforcing those standards and defending the rights protected by these statutes.

Given the flexibility and greater range of actions based on the Refuse Act, passage of the 1972 Act serves to accentuate the important federal questions raised by the decision of the Fifth Circuit. In view of past history it seems hardly an exaggeration to conclude that the effectiveness of the new standards—and the restoration of water quality to this nation—is of a piece with the effectiveness of action by private citizens and citizen groups. The availability of a full range of remedies for

protected parties, both private and governmental, is essential for the preservation and renewal of our once sparkling treasures.

III.

THE DISTINCTION MADE BETWEEN THE RIGHTS OF RIPARIAN LANDOWNERS AND THOSE OF OTHER CLASSES AFFECTED BY VIOLATION OF THE REFUSE ACT APPEARS TO BRING THE FIFTH CIRCUIT INTO CONFLICT WITH THIS COURT AND WITH THE SECOND CIRCUIT.

A distinction between the rights of riparian landowners and those of other classes affected by the Act is without basis in the legislative history of the Act or in its previous judicial interpretation. If that distinction is based on the availability of an alternate remedy in state court, then it is in conflict with several decisions by this Court.

This Court expressly rejected the theory that the mere presence of an alternative theory of action arguable at the state level dispels a claim to a *federal* right in *Bell v. Hood*, 327 U.S. 678, 681 (1946):

> Before deciding there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the laws of the United States. For to that extent the party who brings suit is master to decide what law he will rely upon * * *.

The question was squarely confronted again in the context of *Monroe v. Pape*, 365 U.S. 167, 183 (1961), and this Court concluded that:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused * * *.

The Fifth Circuit has applied this rule in the civil rights case of *Burnett v. Short*, 441 F.2d 405 (5th Cir. 1971), but the distinction raised in the instant case suggests a contrary rule, one forcefully rejected by the Second Circuit in *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2nd Cir., 1956):

> Although a right created by a federal statute covers the same ground as a right already existing under the common law of the states and territories, a suit based on that federal statute is one 'arising under' a law of the United States * * * .

CONCLUSION

The decision of the Fifth Circuit in *Guthrie v. Alabama By-Products* conflicts with decisions of this Court and with decisions in other circuits on several grounds. The decision raises questions of continuing legal and practical importance which should be reviewed by this Court.

Respectfully submitted,

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Attorney for Amicus Curiae
Environmental Defense Fund

We wish to acknolwedge the substantial assistance of James A. Beha, Harvard Law School, in the preparation of this brief.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, ET AL., PETITIONERS

v.

ALABAMA BY-PRODUCTS COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

1. Petitioners are numerous riparian landowners along the Warrior River—a navigable river in Alabama—and its tributaries. Petitioners brought this action in the United States District Court for the Northern District of Alabama, alleging that the respondent companies have discharged and are discharging industrial wastes into the tributaries of the Warrior River in violation of Section 13 of the Rivers and Harbors Act of 1899 (also known as the Refuse

seeking to impose statutory criminal penalties or by bringing a civil action for civil injunctive relief. Cf. *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F. 2d 81 (C.A. 2). The dismissal of petitioners' claim under the Refuse Act does not leave them without a remedy, since they are free to pursue their claims under the common law of nuisance or trespass. The question whether such an action would arise under the federal common law and thus could be brought in the federal courts under 28 U.S.C. 1331(a) (see *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 8–108) was not presented to the courts below and thus is not in issue here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

FILE COPY (D)

FEB 13 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, ET AL., *Petitioners*

v.

ALABAMA BY-PRODUCTS COMPANY, ET AL.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S RESPONSE TO MEMORANDUM OF THE UNITED STATES

ROSCOE B. HOGAN
Counsel for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1672

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v.

ALABAMA BY-PRODUCTS COMPANY, ET AL.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S RESPONSE TO MEMORANDUM OF THE UNITED STATES

The petitioners submit this response: (1) To call this Court's attention to what is believed to be certain inconsistencies between the position of the United States in the memorandum submitted herein and in current enforcement activities under the Refuse Act of 1899, and; (2) To urge the full consideration of and adoption of the positions taken by the Environmental Defense Fund in the Motion For Leave to File a Brief as Amicus Curiae.

First: The United States, in brief, states that it agrees with petitioners that no impediment to navigation is required to make discharges without permits unlawful. Nonetheless, the lower Courts did hold to the contrary, and this will become the rule of the Fifth Circuit unless reversed here.

Second: Insofar as the decisions of the lower Courts do impose an "effect on navigation" test under the Refuse Act, this requirement must apply to both private actions and actions of the United States because Section 13 of the Refuse Act prohibits defined conduct and makes no distinction between what might be actionable by the United States and what might be actionable by private citizens.

Third: The United States cites *Connecticut Action Now, Inc. v. Roberts Plating Co.* (U.S.C.A. 2d 1972) 457 F. 2d 81 as holding that no private action will lie where navigational interests are not involved. The brief of the Environmental Defense Fund, footnote 6, p. 10, properly notes that this question was left open by the Second Circuit. We go further. That case was a qui tam action where the claimant sustained no direct damages. It is a "standing to sue" case and has nothing whatever to do with the claims in this case. Moreover, the discussion by that Court of *J. I. Case v. Borak* 377 U. S. 426 (1964) clearly recognizes the distinction between that case and this case.

Fourth: The *Federal Water Control Act of 1972*, 86 Stat. 816, does declare a moratorium on new Section 13 Refuse Act prosecutions. It does not apply to pending actions and does not repeal, but merely tolls, the application of the Act until December 31, 1974. It would require a seer to predict the future use of the Refuse Act, but the lower Courts' decisions in the petitioners' case are a present threat to the future use of the Act.

Fifth: Although the petitioners' counsel has not seen the application of the United States for certiorari in *U. S.*

v. Pennsylvania Industrial Chemical Co., #72-624, it would seem that the United States did not consider Section 13 of the Refuse Act of limited importance to an action in which it was a party.

Sixth: The recent history and avowed future interest of the United States was clearly stated by the Hon. Kent Frizzell, Assistant Attorney General of the United States for Land and Natural Resources in a speech at the Cumberland School of Law, Samford University on February 6, 1973 in which it was remarked that the United States contemplated continued action under Section 13 of the Refuse Act and furnished the following tables of activity by the United States under Section 13 of the Refuse Act:

(A) The United States has brought the following number of criminal actions under the Refuse Act of 1899:

Fiscal	1964-1969	43
Fiscal	1970	129
Fiscal	1971	191
Fiscal	1972	198
Fiscal	1973	Number not readily available

(B) The United States has brought the following number of civil actions under the Refuse Act of 1899, commencing on March 13, 1970:

Fiscal	1970	2
Fiscal	1971	55
Fiscal	1972	68
Fiscal	1973 to Feb. 8	24

Seventh: The brief of the Environmental Defense Fund raises considerations of the desirability of "citizen actions" in the enforcement of environmental statutes. The provisions of the Federal Water Pollution Control Act also recognize the desirability of citizen action. This case is,

however, more than a citizen's action to supplement Federal or State activities. This is an action by private citizens against law breakers to redress the wrong done directly to them.

We urge that the Petition for a Writ of Certiorari be granted.

Respectfully submitted.

ROSCOE B. HOGAN
Counsel for Petitioners

February 12, 1973

FILE COPY

MAR 16 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, ET AL,
Petitioners.

versus

ALABAMA BY-PRODUCTS COMPANY, ET AL,
Respondents.

APPLICATION FOR REHEARING

on Refusal of Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, ET AL,
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versus

ALABAMA BY-PRODUCTS COMPANY, ET AL,
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APPLICATION FOR REHEARING

on Refusal of Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners request that the Court reconsider its denial of the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioners respectfully submit that the refusal to review the actions of the Northern District of Alabama and the Fifth Circuit has left an anomalous situation for private citizens' actions under the Rivers and Harbors Act of 1899 (Refuse Act), 30 Stat. 1152, as amended, and particularly under Section 13 of that Act, 33 U.S.C. §407.

First: Private citizens' actions can apparently be brought under sections of the Act other than Section 13. See cases cited pages 18-20 of the Petition for Certiorari. Thus, only where refuse or pollution causes the damage is a private

citizen denied relief for a violation of the Act. Petitioners submit that allowing a civil action under some sections of the Act and not Section 13, is inherently discriminatory and a denial of due process to those private citizens.

Second: Private citizens can maintain an action under Section 13 if they are navigating the waterway, but not if they live on the waterway. See: *Acme Boat Rentals v. J. Ray McDermott & Co.* (U.S.C.A. 5th 1970) 424 F. 2d 393. This, too, is inherently discriminatory and a denial of due process.

Third: If the position of the United States, as set forth in point 3 of the Solicitor General's memorandum is correct, Section 13 is to be construed in one way when the United States is a party and in another way when a private citizen is a party. Since no particular incidents of sovereignty can compel this conclusion, the position of the United States, as set forth in its brief, is that the Act should be applied to discriminate against the very class of citizens most directly injured.

Fourth: In interviews conducted with counsel of the Environmental Protection Agency and the Solicitor General's staff on March 9, 1973, it was stated that the E.P.A. had not been unduly concerned with the decision in this case because, while it has been repeatedly cited by defense counsel in actions brought under the Pollution Act, the United States had so far been able to prevail on the Courts considering the actions to disregard this decision and to distinguish the case. But there is no rational basis for such a distinction as that suggested by the United States and to allow the decision to stand is a risk that may ultimately return the Pollution Act to its prior oblivion.

Fifth: It is the avowed policy of E.P.A. and of the Department of Justice to continue to bring actions, where allowed by the 1972 amendments to the Water Pollution

Control Act irrespective of any navigational interest or interference or impediment to navigation.

We recognize that we filed our response to the Solicitor General's memorandum late and, therefore, it is possible that some of the justices were unable to consider it before ruling on our Petition for Writ of Certiorari. We, therefore, respectfully request the Court to review our said response which is adopted as an appendix to this Application for Rehearing. We urge that the Court reconsider the response to the Memorandum of the Solicitor General to the United States and the brief of the Environmental Protection Agency. We urge that this Court grant the Writ of Certiorari and reverse the lower courts and, thus, reaffirm the right of the private citizen, not merely the United States, to protect his own interests in the Courts of this Nation.

Respectfully submitted.

Roscoe B. Hogan
Counsel for Petitioners

March 15, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, ET AL., *Petitioners*

v.

ALABAMA BY-PRODUCTS COMPANY, ET AL.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S RESPONSE TO MEMORANDUM OF THE UNITED STATES

ROSCOE B. HOGAN
Counsel for Petitioners

IN THE

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Fifth: Although the petitioners' counsel has not seen the application of the United States for certiorari in *U. S.*

v. Pennsylvania Industrial Chemical Co., #72-624, it would seem that the United States did not consider Section 13 of the Refuse Act of limited importance to an action in which it was a party.

Sixth: The recent history and avowed future interest of the United States was clearly stated by the Hon. Kent Frizzell, Assistant Attorney General of the United States for Land and Natural Resources in a speech at the Cumberland School of Law, Samford University on February 6, 1973 in which it was remarked that the United States contemplated continued action under Section 13 of the Refuse Act and furnished the following tables of activity by the United States under Section 13 of the Refuse Act:

(A) The United States has brought the following number of criminal actions under the Refuse Act of 1899:

Fiscal	1964-1969	43
Fiscal	1970	129
Fiscal	1971	191
Fiscal	1972	198
Fiscal	1973	Number not readily available

(B) The United States has brought the following number of civil actions under the Refuse Act of 1899, commencing on March 13, 1970:

Fiscal	1970	2
Fiscal	1971	55
Fiscal	1972	68
Fiscal	1973 to Feb. 8	24

Seventh: The brief of the Environmental Defense Fund raises considerations of the desirability of "citizen actions" in the enforcement of environmental statutes. The provisions of the Federal Water Pollution Control Act also recognize the desirability of citizen action. This case is,

however, more than a citizen's action to supplement Federal or State activities. This is an action by private citizens against law breakers to redress the wrong done directly to them.

We urge that the Petition for a Writ of Certiorari be granted.

Respectfully submitted.

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February 12, 1973